

PROCEEDINGS AND ORDERS

DATE: [06/13/90]

CASE NBR: [89105900] CFX

STATUS: [

]

SHORT TITLE: [Rust, John E.

]

VERSUS

[Gunter, Frank O., et al.

]

DATE DOCKETED: [102589]

PAGE: [01]

*****DATE****NOTE*****PROCEEDINGS & ORDERS*****

Oct 25 1989 Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.

Nov 30 1989 DISTRIBUTED. January 5, 1990

Jan 2 1990 Response requested. (Due February 1, 1990)

Feb 2 1990 Order extending time to file response to petition until March 3, 1990.

Mar 1 1990 Brief of respondents Frank O. Gunter, et al. in opposition filed.

Mar 8 1990 REDISTRIBUTED. March 23, 1990

Mar 12 1990 Reply brief of petitioner Rust filed.

Mar 26 1990 Petition GRANTED.

Apr 6 1990 Motion of petitioner for appointment of counsel filed.

Apr 16 1990 Motion for appointment of counsel GRANTED and it is ordered that Alvin J. Bronstein, Esquire, of Washington,

SHOW

PROCEEDINGS AND ORDERS

DATE: [06/13/90]

CASE NBR: [89105900] CFX

STATUS: [

]

SHORT TITLE: [Rust, John E.

]

VERSUS

[Gunter, Frank O., et al.

]

DATE DOCKETED: [102589]

PAGE: [02]

*****DATE****NOTE*****PROCEEDINGS & ORDERS*****

Apr 16 1990 Motion for appointment of counsel GRANTED and it is ordered that Alvin J. Bronstein, Esquire, of Washington, D. C., is appointed to serve as counsel for the petitioner in this case.

Apr 16 1990 Order extending time to file brief of petitioner on the merits until June 15, 1990.

Apr 26 1990 Record filed.

May 1 1990 Record filed.

May 23 1990 Motion of Alvin J. Bronstein, Esquire, to withdraw as counsel for petitioner filed.

May 25 1990 DISTRIBUTED. May 31, 1990. (Above motion).

May 30 1990 Response of Robert M. Spire, Attorney General of Nebraska to motion of Alvin J. Bronstein for leave to withdraw as Counsel for the petitioner filed and distributed.

- 2/PP

SHOW

PROCEEDINGS AND ORDERS

DATE: [06/13/90]

CASE NBR: [89105900] CFX

STATUS: []

SHORT TITLE: [Rust, John E.]

VERSUS [Gunter, Frank O., et al.]

DATE DOCKETED: [102589]

-----DATE-----NOTE-----

PROCEEDINGS & ORDERS

PAGE: [03]

Jun 1 1990

DISTRIBUTED. JUNE 7, 1990. (MOTION OF ALVIN J. BRONSTEIN, ESQUIRE, TO WITHDRAW AS COUNSEL FOR THE PETITIONER).

Jun 4 1990

Motion of petitioner for appointment of counsel filed.

Jun 11 1990

The motion of Alvin J. Bronstein, Esquire, to withdraw as counsel for the petitioner is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Eighth Circuit for further consideration in light of the representations made by counsel for petitioner appointed by the Court in his motion to withdraw as counsel filed May 22, 1990, the response to that motion filed by respondent May 30, 1990, and petitioner's motion for appointment of counsel filed June 4, 1990. The motion of petitioner for appointment of new counsel is denied as moot. Justice

SHOW

PROCEEDINGS AND ORDERS

DATE: [06/13/90]

CASE NBR: [89105900] CFX

STATUS: []

SHORT TITLE: [Rust, John E.]

VERSUS [Gunter, Frank O., et al.]

DATE DOCKETED: [102589]

-----DATE-----NOTE-----

PROCEEDINGS & ORDERS

PAGE: [04]

Jun 11 1990

The motion of Alvin J. Bronstein, Esquire, to withdraw as counsel for the petitioner is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Eighth Circuit for further consideration in light of the representations made by counsel for petitioner appointed by the Court in his motion to withdraw as counsel filed May 22, 1990, the response to that motion filed by respondent May 30, 1990, and petitioner's motion for appointment of counsel filed June 4, 1990. The motion of petitioner for appointment of new counsel is denied as moot. Justice Stevens, concurring: While I join the Court's disposition, I believe it is appropriate also to call the Court of Appeals' attention to our decision in *Neitzke v. Williams*, 490 U. S. ----- (1989), a case

Last page of docket

SHOW

PROCEEDINGS AND ORDERS

DATE: [06/13/90]

CASE NBR: [89105900] CFX

STATUS: []

SHORT TITLE: [Rust, John E.]

VERSUS [Gunter, Frank O., et al.]

DATE DOCKETED: [102589]

-----DATE-----NOTE-----

PROCEEDINGS & ORDERS

PAGE: [05]

that it apparently overlooked when it entered its earlier judgment.

89-5900

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

No. _____

JOHN E. RUST,

Petitioner,

vs.

FRANK O. GUNTER, HAROLD W. CLARKE,
GARY GRAMMER, FRANCIS X. HOPKINS,
MARIO PEART, JOHN T. EGGERS, ROGER
PEHRSON, DOUGLAS ADAMS, ROBERT
BENSON, TERRY KIENE, RUSSELL SCHUSTER,
MICHAEL R. FORD, KARL EISBACK,
NEBRASKA STATE PENITENTIARY HOUSING
UNIT #4 CORRECTIONAL OFFICERS/CORPORALS,
NEBRASKA STATE PENITENTIARY CLASSIFICA-
TION COMMITTEE MEMBERS,

Respondents.

MOTION TO PROCEED IN
FORMA PAUPERIS

COMES NOW Petitioner, John E. Rust, and moves pursuant to
28 U.S.C. §1915 for leave to proceed in forma pauperis in seeking
a writ of certiorari before this Court.

In support of this motion, Petitioner has attached his affi-
davit which has been prepared pursuant to Supreme Court Rule 46.

Respectfully submitted,

RECEIVED

OCT 25 1989

OFFICE OF THE CLERK
SUPREME COURT, U.S.

John E. Rust
John E. Rust

P.O. Box 2500
Lincoln, Nebraska 68502-0500

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing
Motion to Proceed in Forma Pauperis, together with a copy of the
Petitioner's Poverty Affidavit filed herewith, was sent to the
Respondents' Attorney: Marie C. Pawol, Assistant Attorney General,
2115 State Capitol Building, Lincoln, Nebraska 68509, by United
States mail, postage prepaid, this 23rd day of October, 1989.

John E. Rust
John E. Rust

9-5900

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

No. _____

JOHN E. RUST,

Petitioner,

vs.

FRANK O. GUNTER, et al.,

Respondents.

)
) AFFIDAVIT IN SUPPORT OF MOTION
) TO SEEK A WRIT OF CERTIORARI
) IN FORMA PAUPERIS
)
)
)

I, JOHN E. RUST, being first duly sworn, depose and say that I am the Petitioner in the above entitled case; that in support of my motion seeking a writ of certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the petition for writ of certiorari are true.

1. Are you presently employed?

a. No. (incarcerated since 1975 under sentence of death.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

a. No.

3. Do you own any cash or checking or savings accounts?

a. No.

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)?

5. List the persons who are dependent upon you for support and state your relationship to those persons.

a. none

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

John E. Rust
John E. Rust, Petitioner

SUBSCRIBED AND SWORN to before me on this 22 day of Oct
1989.

Jo Gray
NOTARY PUBLIC



No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

-----o-----
JOHN E. RUST,

Petitioner,

vs.

FRANK O. GUNTER, HAROLD W. CLARKE, GARY
GRAMMER, FRANCIS X. HOPKINS, MARIO PEART,
JOHN T. EGGERS, ROGER PEHRSON, DOUGLAS
ADAMS, ROBERT BENSON, TERRY KIENE,
RUSSELL SCHUSTER, MICHAEL R. FORD, KARL
EISBACK, NEBRASKA STATE PENITENTIARY
HOUSING UNIT #1, CORRECTIONAL OFFICERS/
CORPORALS, NEBRASKA STATE PENITENTIARY
CLASSIFICATION COMMITTEE MEMBERS

Respondents.
-----o-----

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE EIGHTH CIRCUIT
-----o-----

JOHN E. RUST - Pro se

P.O. Box 2500
Lincoln, Nebraska 68502-0500

QUESTIONS PRESENTED

1. Whether a new statute, and its most recent statutory interpretation, in conjunction with the subsequent enactment of new rules and regulations to allow imposition of solitary confinement are ex post facto when applied retrospectively to Petitioner whose criminal offenses were committed prior to the enactment of the statute, and its recent interpretation, and the subsequent enactment of rules and regulations.
2. Whether the imposition of solitary confinement upon Petitioner, totally without penological justification, involves unnecessary infliction of pain and is grossly disproportionate to the end to be achieved or the crime warranting imprisonment.
3. Whether some type of meaningful periodic review of the conditions of death row confinement is required to insure that conditions do not violate the Constitution.
4. Whether Petitioner has stated a claim upon which relief may be granted.

LIST OF PARTIES

The parties to the proceedings below and before this Court is the petitioner John E. Rust and respondents Frank O. Gunter, Harold W. Clarke, Gary Grammer, Francis X. Hopkins, Mario Peart, John T. Eggers, Roger Pehrson, Douglas Adams, Robert Benson, Michael R. Ford, Karl Eisback, Nebraska State Penitentiary Officers/Corporals, Nebraska State Penitentiary Classification Committee Members.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	1
LIST OF PARTIES	11
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	8
I. The retrospective imposition of solitary confinement pursuant to a statute, its most recent statutory reinterpretation, and the enactment of new rules and regulations, is ex post facto when applied to petitioner whose criminal offenses were committed prior to the enactments and reinterpretation	8
II. The Eighth Amendment prohibits conditions of confinement that are totally without penological justification and involves unnecessary infliction of pain and is grossly disproportionate to the end to be achieved or the crime warranting imprisonment	14
III. Some type of meaningful periodic review of the administrative segregation of inmates sentenced to the death penalty is constitutionally required	17
CONCLUSION	20
APPENDIX A (Opinion and Judgment of Court of Appeals) . . .	1a
APPENDIX B (Judgment of the District Court)	1b
APPENDIX C (Magistrate's Report and Recommendation of the District Court)	1c

TABLE OF AUTHORITIES

<u>Clark v Brewer</u> , 578 F. Supp. 1501 (S.D. Ia. 1983), <u>aff'd as modified</u> , 776 F.2d 226 (8th Cir. 1985)	18,19,20
<u>Cummings v Missouri</u> , 71 U.S.(4 Wall.) 277 (1867)	8,9
<u>Department of Banking and Finance of State v Wilken</u> , 217 Neb. 796, 353 N.W.2d 145 (1984)	19,20
<u>DeVeau v Braisted</u> , 363 U.S. 144 (1960)	14
<u>Douglas County Welfare Administration v Parks</u> , 204 Neb. 570, 284 N.W.2d 10 (1979)	18,19,20

	<u>Page</u>
<u>Estelle v Gamble</u> , 429 U.S. 97 (1976)	16
<u>Gerashty v United States Parole Commission</u> , 579 F.2d 238, (3d Cir. 1978), <u>vacated on other grounds</u> , 445 U.S. 388 (1980)	9
<u>Giampetruzzi v Malcolm</u> , 406 F. Supp. 836 (D.C.N.Y. 1975) .	19,20
<u>Greenfield v Scafati</u> , 277 F. Supp. 644 (three-judge court), <u>summarily aff'd</u> , 390 U.S. 713 (1968)	8
<u>Heathman v Benson</u> , CV81-L-227 (D.Neb. unpublished Memorandum of Decision dated 9 August 1983 and Judgment dated 4 October 1983)	17
<u>Hewitt v Helms</u> , 459 U.S. 460 (1983)	18,19,20
<u>Hoitt v Vitek</u> , 497 F.2d 598 (1st Cir. 1974)	15
<u>Holden v Minnesota</u> , 137 U.S. 483 (1890)	8,11,12
<u>Holguin v Raines</u> , 695 F.2d 372 (9th Cir. 1982)	9
<u>In re Medley</u> , 134 U.S. 160 (1890)	8,9,10,11,13,15
<u>In re Tyson</u> , 22 Pac. 810 (1889)	10
<u>Jefferson v Southworth</u> , 447 F. Supp. 179 (D.R.I. 1978) . . .	16
<u>Kelly v Brewer</u> , 525 F.2d 394 (8th Cir. 1975)	20
<u>Lindsey v Washington</u> , 301 U.S. 397 (1937)	8
<u>Love v Fitzharris</u> , 460 F.2d 382 (9th Cir. 1972), <u>vacated as</u> <u>moot</u> , 409 U.S. 1100 (1973)	8,9
<u>Malloy v South Carolina</u> , 237 U.S. 180 (1915)	11,12
<u>Mayo v Lane</u> , 867 F.2d 374 (7th Cir. 1989)	19,20
<u>Miller v Henman</u> , 804 F.2d 421 (7th Cir. 1986)	19
<u>Morris v Travisono</u> , 549 F. Supp. 291 (D.R.I. 1982), <u>aff'd</u> , 707 F.2d 28 (1st Cir. 1983)	15
<u>Nadeau v Helgemore</u> , 561 F.2d 411 (1st Cir. 1977)	16
<u>Palmer v Gunter</u> , No. 89-5586, petition for a writ of certiorari docketed on 15 September 1989	6,9
<u>Peterkin v Jeffes</u> , 855 F.2d 1021 (3d Cir. 1988)	20
<u>Piper v Parrin</u> , 560 F. Supp. 253 (D.N.H. 1983)	9
<u>Reed v Parratt</u> , 207 Neb. 796, 301 N.W.2d 343 (1981)	13
<u>Robinson v California</u> , 370 U.S. 660 (1962)	16
<u>Rooney v North Dakota</u> , 196 U.S. 319 (1905)	8,11,12,17
<u>Rudolph v Locke</u> , 594 F.2d 1076 (5th Cir. 1979)	12,15
<u>Ruiz v Estelle</u> , 503 F. Supp. 1265 (S.D. Tex. 1980)	19,20
<u>Shepard v Taylor</u> , 556 F.2d 648 (2d Cir. 1977)	8
<u>Smith v Couchlin</u> , 748 F.2d 783 (2d Cir. 1984)	20
<u>Smith v Sorensen</u> , 748 F.2d 427 (8th Cir. 1984)	19
<u>Solesbee v Balkcom</u> , 339 U.S. 9 (1950)(dissenting opinion) .	10,15

	<u>Page</u>
<u>State v Stratton</u> , 220 Neb. 854, 374 N.W.2d 31 (1985)	13
<u>Trop v Dulles</u> , 356 U.S. 86 (1958)	14
<u>Turner v Safely</u> , ___ U.S. ___, 107 S.Ct. 2254 (1988)12,13,14,15,16	
<u>United States v Biza</u> , 86 F. Supp. 939 (D. Neb. 1949)	9
<u>Warden v Marrero</u> , 417 U.S. 653 (1974)	8
<u>Weaver v Graham</u> , 450 U.S. 24 (1981)	8,10
<u>Williams v Armontrout</u> , 831 F.2d 803 (8th Cir. 1987)	20
<u>Winfrey v Brewer</u> , 570 F.2d 761 (8th Cir. 1978)	20
<u>Wolff v McDonnell</u> , 418 U.S. 539, 94 S.Ct. 2963 (1974) . . .	7,13

STATUTES CITED

	<u>Page</u>
28 U.S.C. §1254	1
42 U.S.C. §1983	1
<u>Neb. Rev. Stat. §29-2204</u>	2,4,13
<u>Neb. Rev. Stat. §83-108.02</u>	7
<u>Neb. Rev. Stat. §83-173</u>	6,7
<u>Neb. Rev. Stat. §83-178</u>	7
<u>Neb. Rev. Stat. §83-179</u>	7
<u>Neb. Rev. Stat. §83-4,109 to 83-4,123</u>	2,3,4,7,13
<u>Neb. Rev. Stat. §83-4,109</u>	2
<u>Neb. Rev. Stat. §83-4,111</u>	2,6
<u>Neb. Rev. Stat. §83-4,111(2)(b)</u>	2,4,13
<u>Neb. Rev. Stat. §83-4,114</u>	3,5,6,8,12, 13,14,17

CONSTITUTIONAL PROVISIONS CITED

	<u>Page</u>
United States Constitution, Art. I, Sec. 10, Cl. 1	8,14

TEXTS CITED

	<u>Page</u>
<u>Solitary Confinement as Psychological Punishment</u> , 13 Calif. W. L. Rev. 265 (1977)	10,15
<u>Life Under Sentence of Death, in The Pains of Imprisonment</u> , 129 (R. Johnson & H. Toch eds. 1982)	16

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

JOHN E. RUST, Petitioner,

vs.

FRANK O. GUNTER, HAROLD W. CLARKE, GARY
GRAMMER, FRANCIS X. HOPKINS, MARIO PEART,
JOHN T. EGGERS, ROGER PEHRSON, DOUGLAS
ADAMS, ROBERT BENSON, TERRY KIENE,
RUSSELL SCHUSTER, MICHAEL R. FORD, KARL
EISBACK, NEBRASKA STATE PENITENTIARY
HOUSING UNIT #4, CORRECTIONAL OFFICERS/
CORPORALS, NEBRASKA STATE PENITENTIARY
CLASSIFICATION COMMITTEE MEMBERS, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner John E. Rust respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the entitled proceeding on 19 October 1989.

OPINIONS BELOW

The judgment and opinion of the Court of Appeals for the Eighth Circuit has not been reported. This judgment and opinion appears as Appendix A of this Petition.

The judgment of the United States District Court for the District of Nebraska (Urbom, D.J.) has not been reported. This judgment appears as Appendix B of this Petition.

The report and recommendation of the Magistrate for the United States District Court for the District of Nebraska has not been reported. This report and recommendation appears as Appendix C of this Petition.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. §1983, the petitioner brought this suit in the District of Nebraska. On 16 June

1989, the District Court ordered the complaint dismissed for failure to state a claim upon which relief may be granted. See Appendixes B and C, *infra*.

On petitioner's appeal, the Eighth Circuit on October 1989, entered a judgment and an opinion affirming the District Court's judgment. See Appendix A, *infra*. Petitioner did not seek a petition for rehearing.

The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

This case involves the following provisions of Nebraska Law.

29-2204. Sentence; term of imprisonment; hard labor; solitary confinement; defendant under eighteen years of age; disposition under provision of juvenile courts. (1) Except as provided in subsection (2) of this section, in all cases when any person shall be convicted of any offense by this code declared criminal, and made punishable by imprisonment in the Department of Correctional Services adult correctional facility, the court shall declare in its sentence for what period of time, within the respective periods prescribed by law, such convict shall be imprisoned at hard labor in the Department of Correctional Services adult correctional facility; and shall moreover determine and declare in its sentence whether any such convict shall be kept in solitary confinement in cells of the Department of Correctional Services adult correctional facility, without labor, and if so, for what period of time.

83-4,109. Adult institutions; disciplinary procedures; how administered. Disciplinary procedures in adult institutions administered by the Department of Correctional Services shall be governed by the provisions of sections 83-4,109 to 83-4,123.

83-4,111. Department of Correctional Services; rules and regulations; purpose contents; rights and privileges of inmates. (1) Within sixty days after July 10, 1976, the department shall adopt and promulgate rules and regulations to establish criteria for justifiably and reasonably determining which rights and priv-

illegals a committed person retains.

(2) Such rules and regulations shall include, but not be limited to, criteria concerning (a) disciplinary restrictions on clothing, bedding, facilities, mail, and visitations in an institution, (b) solitary confinement, (c) grievance procedures, hearings, and review, (d) good-time credit, (e) criteria for psychological treatment and sociological development programs, (f) rehabilitation opportunities, and (g) educational or employment programs.

(3) The rules and regulations adopted pursuant to sections 83-4,109 to 83-4,123 shall in no manner deprive an inmate of any rights and privileges to which such person is entitled under other provisions of law or under policies adopted in a correctional institution.

83-4,114. Disciplinary restrictions and punishment; degree; solitary confinement; duration; exceptions. There shall be no corporal punishment or disciplinary restrictions on diet. Disciplinary restrictions on clothing, bedding, mail, visitations, use of toilets, washbowls, or scheduled showers shall be imposed only for abuse of such privilege or facility. No person in the adult division shall be placed in solitary confinement for disciplinary reasons for more than fifteen consecutive days, or more than thirty days out of any forty-five day period, except in cases of violence or attempted violence committed against another person or property when an additional period of isolation for disciplinary reasons is approved by the warden. This provision shall not apply to segregation or isolation of persons for purposes of institutional control.

STATEMENT OF THE CASE

On approximately 1 August 1975, petitioner John E. Rust was convicted for the commission of the 21 February 1975 criminal offenses of First Degree Murder in perpetration of or attempt to perpetrate a robbery and three (3) counts of Shooting with Intent to Kill, Wound or Maim. On approximately 30 October 1975, petitioner was sentenced to death for the First Degree Murder in perpetration of or attempt to perpetrate a robbery and to three (3)

sentences of 16 2/3 to 50 years for each count of Shooting with Intent to Kill, Wound or Maim. Each of petitioner's four (4) sentences are to be served concurrently. The sentencing court did not order that petitioner be kept in solitary confinement for any period of time between the sentence of death and execution thereof or for any period of time by virtue of each of the three sentences of 16 2/3 to 50 years.

On 21 February 1975, when petitioner's criminal offenses were committed, Neb. Rev. Stat. §§29-2204 (Reissue 1985) expressly gave the trial court the power to declare whether a convict shall be kept in solitary confinement, and if so, for what period of time. On approximately 10 July 1976, Neb. Rev. Stat. §§83-4,109 to 83-4,123 (Reissue 1987) was enacted into law.

That inmates sentenced to the death penalty were allowed to reside in the general population of the Nebraska State Penitentiary from 1975, when the first Nebraska inmate was sentenced to the death penalty in August 1975, through approximately June 1978, when an administrative decision was made to permanently segregate all inmates sentenced to the death penalty. From August 1975 through 8 June 1978 the administrative practice and policy was that whenever an execution date was fixed for an inmate sentenced to the death penalty, said inmate was removed from the general population during the pendency of the fixed execution and was returned to the general population when the execution date was stayed. The inmate was confined in close confinement, under administrative detention, pursuant to Rule 6(14)(a)(vii) of Chapter 4 of the Nebraska Department of Correctional Services Administrative Rules and Regulations (hereinafter referred to as "NDCS-Rule 6(14)").

On approximately 27 October 1977, petitioner was informed that he was being removed from the general population of the Nebraska State Penitentiary (hereinafter referred to as "NSP") and confined in the NSP's Adjustment Center under Administrative Detention because the Nebraska Supreme Court had set an execution date and that petitioner would be returned to the general population when he had received a stay of his execution date. On approximately 19 January 1978, petitioner's execution date of 23 January 1978 was

stayed until 24 April 1978. On approximately 17 April 1978, petitioner received an indefinite stay of his execution day.

On approximately 8 June 1978, an administrative decision was made to permanently segregate all inmates sentenced to the death penalty in administrative detention pursuant to NDCS Rule 6(14). This decision was based upon two (2) "conclusive" or "irrebuttable" presumptions: "That inmates sentenced to the death penalty have a greater potential of suicide than the average inmate, and there is greater risk of attempted escape. In addition, administrators have determined that such inmates constitute a threat to the good order, safety and security of the institution."

That approximately May 1978, former Nebraska Department of Correctional Services Director Joseph Vitek sent a letter to Nebraska Civil Liberties Union Executive Director stating that petitioner would be reviewed for placement in the general population of the Nebraska State Penitentiary since petitioner's date of execution was no longer fixed. On approximately 8 June 1978, pursuant to NDCS 6(14), former Deputy Warden Thomas K. Mason sent the petitioner a detailed written explanation which stated that Mr. Mason had reviewed petitioner's status and had determined that the petitioner would remain in administrative detention due to his still being under the sentence of death. On approximately 8 June 1978, pursuant to NDCS Rule 6(14), former Deputy Warden Thomas K. Mason sent a similar detailed written explanation to each of the other inmates under the death penalty which informed them that they would be confined in administrative detention because they were under the sentence of death.

On approximately 26 November 1984 and 5 December 1984, two Death Row schedules were promulgated which resulted in the solitary confinement of all inmates sentenced to the death penalty. On or about September 1985, NDCS Rule 6(14) was officially repealed and replaced with Rule 6(16) of Chapter 4 of the Nebraska Department of Correctional Services Administrative Rules and Regulations (hereinafter referred to as "NDCS Rule 6(16)"). That NDCS Rule 6(16) is derived from Neb. Rev. Stat. 883-4,114 (Reissue 1987).

Respondents utilize the same "conclusive" or "irrebuttable"

presumptions, which have been utilized since 8 June 1978, to justify the segregation of inmates, sentenced to the death penalty, in indefinite/permanent solitary confinement. Respondents have never put forth any evidence to establish that an emergency resulting in a new factual situation, or any legitimate penological interests, existed to necessitate the new interpretation of 883-4,114 and the subsequent enactment of new rules and regulations to terminate petitioner's close confinement, in order to impose indefinite/permanent solitary confinement.

Prior to the enactment of the 26 November 1984 and 5 December 1984 Death Row schedules and the repeal of NDCS Rule 6(14), the respondents interpreted and applied the solitary confinement, for purposes of institutional control, provisions of 883-4,114 and NDCS Rule 6(16) to selected inmates who warranted such confinement, but was not applied to inmates sentenced to the death penalty.

The 26 November 1984 and 5 December 1984 Death Row schedules and NDCS Rule 6(16) were enacted pursuant to the legislatively delegated rule making authority of Neb. Rev. Stat. 883-173, 83-4,111 and 83-4,114 (Reissue 1987) and have the force and effect of statutory law. The Nebraska Legislature's enactment of 883-4,111 and 83-4,114 and the respondents' new interpretation/application of 883-4,114 and their enactment of the 26 November 1984 and 5 December 1984 Death Row schedules and the September 1985 NDCS Rule 6(16), to allow the solitary confinement of inmates sentenced to the death penalty, occurred well after the 21 February 1975 commission of petitioner's four (4) criminal offenses.

The factual situation of petitioner's ex post facto question is distinguishable from the factual situation of the ex post facto question in Palmer and Reeves v Gunter, et al., No. 89-5586, petition for a writ of certiorari docketed on 15 September 1989. Petitioner's criminal offenses were committed before the Legislature enacted 883-4,114, whereas, Palmer and Reeves' criminal offenses were committed after the enactment of 883-4,114 but prior to the respondents' new interpretation of 883-4,114 and subsequent enactment of rules and regulations to retrospectively impose solitary confinement.

The legislative history of Neb. Rev. Stat. §§83-4,109 to 83-4,123 (Reissue 1987) establishes that the legislative intent of LB275 is to bring Nebraska into conformity with the Court's decision in Wolff v McDonnell, 418 U.S. 539, 94 S.Ct. 2963 (1974) and to establish due process standards for disciplinary proceedings. That under §§83-4,109 to 83-4,123 petitioner's placement in solitary confinement can be triggered only by certain events: violation of certain rules and/or is a threat to the good order, safety and security of the institution and only after being provided with the minimum requirements of procedural due process to ascertain whether or not these events have occurred or exist.

The respondents have determined that the petitioner should be segregated in solitary confinement based upon the "conclusive" or "irrebuttable" presumptions detailed supra at 5. These "conclusive" or "irrebuttable" presumptions constitute an event which require minimum requirements of procedural due process to ascertain whether or not these specified events have occurred or exist. Respondents have refused to provide petitioner with the minimum requirements of procedural due process prior to or after his placement in solitary confinement since 26 November 1984.

On or about 19 March 1986, petitioner was officially placed under the Nebraska Department of Correctional Services Classification system. Petitioner is classified and assigned to the Administrative Segregation status of Administrative Confinement. Respondents have consistently refused to provide petitioner with the mandatory due process procedures required by the State of Nebraska Department of Correctional Services Adult Inmate Classification Manual (hereinafter referred to as the "Custody Classification Manual"), Administrative Regulations and Operational Memorandums which have the force and effect of statutory law due to their having been enacted under the legislatively delegated rulemaking authority of §§83-173, 83-108.02, 83-178, and 83-179 (Reissue 1987).

Respondents have consistently refused to conduct any type of meaningful review of petitioner's confinement status in order to ascertain whether he should be released from solitary confinement or whether or not the solitary confinement has become cruel and

unusual punishment.

REASONS FOR GRANTING THE WRIT

THE RETROSPECTIVE IMPOSITION OF SOLITARY CONFINEMENT PURSUANT TO A STATUTE, ITS MOST RECENT STATUTORY REINTERPRETATION, AND THE ENACTMENT OF NEW RULES AND REGULATIONS, IS EX POST FACTO WHEN APPLIED TO PETITIONER WHOSE CRIMINAL OFFENSES WERE COMMITTED PRIOR TO THE ENACTMENTS AND REINTERPRETATION.

The Eighth Circuit's decision directly conflicts with the Court's decisions in In re Medley, 134 U.S. 160 (1890); Holden v Minnesota, 137 U.S. 483 (1890); Cummings v Missouri, 71 U.S. (4 Wall.) 277 (1867); Rooney v North Dakota, 196 U.S. 319 (1905). The Court has explicitly recognized that pre-execution confinement is a distinct punishment, and one that may be considered completely severed from the punishment of death. In re Medley, 134 U.S. 160, 171 (1890). This Court in Weaver v Graham, 450 U.S. 24 (1981) stated that the following precedent is still law:

(W)e have held that a statute may be retrospective even if it alters punitive conditions outside the sentence. Thus, we have concluded that a statute requiring solitary confinement prior to execution is ex post facto when applied to someone who committed a capital offense prior to its enactment, but not when applied only prospectively. Compare In re Medley, 134 U.S. 160, 10 S.Ct. 384, 33 L.Ed. 835 (1890), with Holden v Minnesota, 137 U.S. 483, 11 S.Ct. 143, 34 L.Ed. 734 (1890). See also Cummings v Missouri, 4 Wall. 277, 18 L.Ed. 356 (1867).

Id. at 32. Also, respondents' official post-sentence action of reinterpreting §83-4,114 to allow the retrospective imposition of the additional punishment of solitary confinement pursuant to the enactment of the 26 November 1984 and 5 December 1984 Death Row schedules and the September 1985 NDCS Rule 6(16) runs afoul of the ex post facto clause. See Shepard v Taylor, 556 F.2d 648, 654 (2d Cir. 1977); Love v Fitzharris, 460 F.2d 382, 384-85 (9th Cir. 1972), vacated as moot, 409 U.S. 1100 (1973); Greenfield v Scafati, 277 F. Supp. 644 (D. Mass. 1967)(three-judge court), summarily aff'd, 390 U.S. 713 (1968); Warden v Marrero, 417 U.S. 653, 663 (1974). This result follows even if the maximum statutory penalty for the crime remains unchanged. See Lindsey v Washington, 301 U.S. 397, 401 (1937).

Many courts have recognized that the ex post facto clause applies with equal force to administrative actions which have the effect of punishing or increasing the punishment for conduct occur-

ring before the administrative change. See Holguin v Raines, 695 F.2d 372, 374 (9th Cir. 1982); Geraghty v United States Parole Commission, 579 F.2d 238, 266 (3d Cir. 1978), vacated on other grounds, 445 U.S. 388 (1980); Love v Fitzharris, 460 F.2d 382, 385 (9th Cir. 1972), vacated as moot, 409 U.S. 1100 (1983); Piper v Perrin, 560 F. Supp. 251, 256 & n. 6 (D.N.H. 1983). As the Third Circuit Court of Appeals stated in Geraghty:

(A) similar prohibition (against ex post facto laws) applies to an increase in punishment brought about by the rule-making, the administrative equivalent of legislation. The legislature cannot, by delegation, escape constitutional limitations on its power.

579 F.2d at 266. The bar upon ex post facto laws cannot be evaded by giving administrative form to laws with a "criminal" or "punitive" effect since the prohibition is directed at the substance and not the form of the legislation,

(W)hat cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding. Cum-

tings v Missouri, 71 U.S.(4 Wall.) 277, 325 (1867); United States v Bize, 86 F. Supp. 939, 946 (D. Neb. 1949).

The Eighth Circuit's summary disposition, pursuant to 8th Cir. R. 12(a), is a misapplication of the law to the facts of the instant case. The Eighth Circuit cites its recent opinion in Palmer v Gunter, No. 88-2245 (filed 24 May 1989)(unpublished per curiam), petition for cert. filed, Palmer v Gunter, No. 89-5586 (filed 15 September 1989), to affirm the district court. Petitioner will, therefore, address the misapplication of the law in Palmer, as extended to petitioner's case by the Eighth Circuit's summary disposition on the ex post facto issue.

The Eighth Circuit's finding that placement in solitary confinement is to enhance the orderly administration of the institution and does not constitute an additional punishment is not supported by the evidence. A similar argument/finding was rejected by the Court in In re Medley, 134 U.S. 160 (1890). The Medley Court

expressly rejected the argument of the counsel for the State of Colorado and the opinion of Judge Hayt (In re Tyson, 22 Pac. 810 (1889)) that solitary confinement was referable to the penal administration for the safekeeping of the prisoner and is not relieved of its objectionable features by the qualifying language. Id. at 167.

For ex post facto purposes, whether a retrospective state statute or administrative rule ameliorates or worsens conditions imposed by its predecessor is a federal question and the inquiry looks to the challenged provision and not to any special circumstance that may mitigate its effect on a particular individual. See Weaver v Graham, 450 U.S. 24, 33 (1981). The text of NDCS Rule 6(16) does not mitigate the punitive effect of solitary confinement for it expressly declares that "Solitary Confinement is the status of confinement in an individual cell having solid, soundproof doors, and depriving the offender of all visual and auditory contact with other persons", thus, petitioner is left to the worst form of solitary confinement. See Medley, at 169.

The Court in In re Medley, 134 U.S. 160 (1890) recognized the adverse effects of solitary confinement upon inmates:

A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others, still, committed suicide; while those who stood the ordeal better . . . did not recover sufficient mental activity to be of any subsequent service to the community.

Id. at 168. See also, Solitary Confinement as Psychological Punishment, 13 Calif. W. L. Rev. 265 (1977)(prisoners confined in solitary confinement for long periods revert to irrational and bizarre behavior, eventually exhibiting one of the following behavior patterns: (1) angry and destructive acts; (2) depressive reactions, sometimes culminating in suicidal attempts; and (3) withdrawn and psychotic behavior).

The Court has recognized that mental suffering from confinement under sentence of death increases the harshness of that punishment. See Medley, at 172; see also, Solesbee v Balkcom, 339 U.S. 9, 14 (1950)(dissenting opinion)(In the history of murder, the

onset of insanity while awaiting execution of a death sentence is not a rare phenomenon). This solitary confinement cannot be viewed or considered as a tool to enhance the orderly administration of the institution. Petitioner is subjected to the respondents' unbridled discretion to repeal and enact rules and regulations that results in the imposition of the historical punishment of solitary confinement. See Medley, at 167-170. Therefore, respondents' imposition of solitary confinement can only be viewed as additional punishment.

The Eighth Circuit cites Malloy v South Carolina, 237 U.S. 180, 183 (1915) in support of its affirmation of the district court's conclusion that the ex post facto clause is not implicated by the imposition of solitary confinement on death row inmates. A careful reading of that case reveals that it is inapplicable to the case at bar.

In Malloy v South Carolina, *supra*, the Court, in response to the meticulous objection based upon change of place for execution and increased number of witnesses, referred to what "this Court said through Mr. Justice Harlan in Holden v Minnesota, 137 U.S. 463, 491, and Rooney v North Dakota, 196 U.S. 319, 325, 326. The Constitutional inhibition of ex post facto was intended to secure substantial personal rights against arbitrary and oppressive legislative action, and not to obstruct mere alteration in conditions deemed necessary for the orderly infliction of humane punishment." *Id.* at 183. While that may be true, it is simply not the issue in the case at bar.

In Malloy v South Carolina, *supra*, the issue presented to the Court was whether the Act of Legislature, approved 17 February 1912, prescribing electrocution as the method of producing death instead of hanging, fixed the place therefor within the penitentiary, and permitted the presence of more invited witnesses than had theretofore been allowed. First, the Eighth Circuit's quotation from Malloy, at 183, dealt with only the objections based upon change of place for execution and increased number of witnesses which is not the issue in the case at bar. Second, the Malloy Court's referring to Holden and Rooney was solely for the same facts of the

specific objections based upon change of place for execution and increased number of witnesses. Third, the Malloy Court did not address the retrospective imposition of solitary confinement since the South Carolina statute did not prescribe solitary confinement in the penitentiary. Fourth, the Holden and Rooney cases, cited in Malloy at 183, decided the additional issue of solitary confinement in the following manner: Holden held that to apply solitary confinement provision to anyone who committed a capital offense prior to the passage of the Act of 1889 is ex post facto; Rooney held that "close confinement" and "solitary confinement" did not import the same kind of punishment and close confinement did not increase the punishment to the disadvantage of the accused. Therefore, the Malloy holding is only applicable to the specific issue of change of place for execution and increased number of witnesses which does not increase the severity of the punishment like solitary confinement.

That prior to and after the reinterpretation of #83-4,114 and the enactment of the 26 November 1984 and 5 December 1984 Death Row schedules and the September 1985 NDCS Rule 6(16), respondents segregated inmates sentenced to the death penalty pursuant to the same two "conclusive" or "irrebuttable" presumptions, *supra*, at 5. Respondents have never put forth any evidence, of the existence of an emergency or new factual situation or any legitimate penological interest, which altered the existing "conclusive" or "irrebuttable" presumptions, to necessitate the reinterpretation of #83-4,114 and the subsequent enactment to the 26 November 1984 and 5 December 1984 Death Row schedules and the September 1985 NDCS Rule 6(16) to terminate petitioner's close confinement, in order to impose indefinite/permanent solitary confinement. That respondents' bare assertion that solitary confinement of petitioner, based upon the same two "conclusive" or "irrebuttable" presumptions utilized for the prior close confinement of inmates sentenced to the death penalty, as an appropriate means of maintaining good order, safety, and security of the institution, is not enough. See Rudolph v Locke, 594 P.2d 1076, 1077 (5th Cir. 1979); Turner v Safely, ___ U.S. ___, 107 S.Ct. 2254, 2261-62 (1987). Under the standard enunciated

in Turner, at 2261-62, the placement of petitioner in solitary confinement is not reasonably related to legitimate penological interests, since it constitutes an exaggerated response to the situation.

That prior to the enactment of §§83-4,111(2)(b) and 83-4,114 the Nebraska Department of Correctional Services utilized solitary confinement as a disciplinary sanction. See Wolff v McDonnell, 418 U.S. 539, 571 n. 19 (1974). The Nebraska Supreme Court has held "That §§83-4,109 to 83-4,123 constitute a special act relating to disciplinary procedures in adult correctional institutions." See Reed v Parratt, 207 Neb. 796, 798, 301 N.W.2d 343, 345 (1981). The legislative history of §§83-4,109 to 83-4,123 establishes that the legislative intent was to bring Nebraska into conformity with the United States Supreme Court in Wolff, supra, and to establish due process standards for disciplinary proceedings administered by the Department of Correctional Services. Thus, under Nebraska law, solitary confinement is a disciplinary procedure for purposes of penal administration.

That Neb. Rev. Stat. §29-2204 (Reissue 1985) was the only statute to allow for imposition of solitary confinement, upon the petitioner, on the date his criminal offenses were committed. That §29-2204 expressly gives the trial court the power to declare whether a convict shall be kept in solitary confinement, and if so, for what period of time. State v Stratton, 220 Neb. 854, 860, 374 N.W.2d 31, 35 (1985). The trial or sentencing court did not order that petitioner be kept in solitary confinement for any period of time between the sentence of death and execution thereof or for any period of time by virtue of each of the three sentences of 16 2/3 to 50 years. It is obvious that the enactment of §83-4,114 on approximately 10 July 1976, the reinterpretation of §83-4,114 which resulted in the subsequent enactment of the 26 November 1984 and 5 December 1984 Death Row schedules and the September 1985 NDCS Rule 6(16) confer upon respondents a power that had been solely confided to the trial court pursuant to §29-2204, and is a departure from the law as it stood when petitioner's criminal offenses were committed. See In re Medley, 134 U.S. at 172.

An analysis, under DeVeau v Braisted, 363 U.S. 144, 160 (1960) (relevant inquiry for determining whether a particular restriction violates the Ex Post Facto Clause) and Turner, at 2261-62, as to the reasonableness of petitioner's solitary confinement, would reveal an exaggerated response to the situation and an intent to punish, which constitutes a violation of the Ex Post Facto Clause. (1) It is equally plain that the existence of the death penalty is not a license to the respondents to devise any punishment short of death within the limits of their imagination. See Trop v Dulles, 356 U.S. 86, 99 (1958)

II

THE EIGHTH AMENDMENT PROHIBITS CONDITIONS OF CONFINEMENT THAT ARE TOTALLY WITHOUT PENOLOGICAL JUSTIFICATION AND INVOLVES UNNECESSARY INFLICTION OF PAIN AND IS GROSSLY DISPROPORTIONATE TO THE END TO BE ACHIEVED OR THE CRIME WARRANTING IMPRISONMENT.

At the outset, it should be noted that on approximately 8 June 1978, petitioner, and other inmates sentenced to the death penalty, were segregated from the general inmate population of the Nebraska State Penitentiary based upon certain "conclusive" or "irrebuttable" presumptions, supra, at 5. These same "conclusive" or "irrebuttable" presumptions have been utilized throughout petitioner's confinement in the close confinement of Administrative Detention under NDCS Rule 6(14) and his subsequent confinement in solitary confinement under the 26 November 1984 and 5 December 1984 Death Row schedules and the September 1985 NDCS Rule 6(16). Respondents have never put forth any evidence, of the existence of an emergency or new factual situation or any legitimate penological interest, which altered the existing "conclusive" or "irrebuttable" presumptions, to necessitate the reinterpretation of §83-4,114 and the subsequent enactment of the 26 November 1984 and 5 December 1984 Death Row schedules and the September 1985 NDCS Rule 6(16) to terminate petitioner's close confinement, in order to impose indefinite/permanent solitary confinement.

That respondents' bare assertion that solitary confinement of petitioner, and other inmates sentenced to the death penalty, based upon the same two "conclusive" or "irrebuttable" presumptions

utilized for the prior close confinement of inmates sentenced to the death penalty, as an appropriate means of maintaining good order, safety, and security of the institution, is not enough. See Rudolph v Locke, 594 F.2d 1076, 1077 (5th Cir. 1979); Turner v Safely, ___ U.S. ___, 107 S.Ct. 2254, 2261-62 (1987). This unreviewable discretion of the respondents should not be open-ended or interminable. See Hoitt v Vitek, 497 F.2d 598, 600 (1st Cir. 1974).

The simple fact that petitioner is under a sentence of death is insufficient to allow the respondents to confine him in solitary confinement for a period approaching indefinite/permanent segregation. More is required. Although no court has ever addressed the question of what precisely is required to support lengthy administrative segregation, the decision in Morris v Travisono, 549 F. Supp. 291 (D.R.I. 1982), *aff'd*, 707 F.2d 28 (1st Cir. 1983) is instructive. The judge ordered the release of an inmate who had been confined in administrative segregation for eight-and-one-half years merely because the state contended (without supporting evidence) that he was a dangerous man. In doing so, the judge stated:

After a thorough examination of the record in this case, I find that the defendants decision to house (plaintiff) in solitary confinement for the past eight-and-a-half years is without penological justification, and has resulted in the "unnecessary and wanton infliction of pain" in violation of the eighth amendment.

Id. at 295. This reasoning should apply to petitioner's administrative segregation in solitary confinement. Respondents can just as easily place petitioner in a form of administrative segregation that involves close confinement instead of solitary confinement.

The Court in In re Medley, 134 U.S. 160, 168 (1890) has recognized the adverse effects of solitary confinement upon inmates. See also, Solitary Confinement as Psychological Punishment, 13 Calif. W. L. Rev. 265 (1977). The Court has recognized that mental suffering from confinement under sentence of death increases the harshness of that punishment. See In re Medley, 134 U.S. 160, 172 (1890). See also, Sollesbee v Balkcom, 339 U.S. 9, 14 (1950) (dissenting opinion). The psychological harms that are associated with death row confinement have been described as the product of life

under intense pressure resulting in varying degrees of deterioration among condemned inmates:

(D)earth row is a pressure cooker in which feelings of helplessness, vulnerability, and loneliness are widespread; death row makes men feel trapped, suffocated, even entombed; death row produces . . . deterioration that must be strenuously resisted if prisoners are to preserve their sanity and human integrity. Condemned prisoners have few avenues of adjustment open to them and must strive, in the final analysis, to endure pressures that threaten to make deterioration their common fate. Johnson, Life Under

Sentence of Death, in The Pains of Imprisonment, 129, 140 (R. Johnson & H. Toch eds. 1982).

That respondents' imposition of indefinite/permanent solitary confinement, upon inmates sentenced to the death penalty, not only will result in greater deterioration but would ultimately precipitate a more rapid fruition of most, if not all, of the alleged "conclusive" or "irrebuttable" presumptions utilized to segregate said inmates. That coupling the psychological harms normally associated with death row confinement with the additional debilitating psychological effects of solitary confinement, is intolerable. Such "deliberate indifference to serious medical needs of inmates under sentence of death" is cruel and unusual punishment. Estelle v Gamble, 429 U.S. 97, 104 (1976); see Nadeau v Helmer, 561 F.2d 411, 420 (1st Cir. 1977).

Petitioner's solitary confinement is totally without penological justification and is grossly disproportionate for the end to be achieved since it is not reasonably related to legitimate penological interests and is an exaggerated response to the situation. See Turner v Safely, 107 S.Ct. at 2261-62; Robinson v California, 370 U.S. 660, 667 (1962) (the means must stand constitutional scrutiny, as well as the end to be achieved). Since no emergency or new factual situation or new penological interest existed, petitioner's solitary confinement can only be viewed as disproportionate and arbitrary, and thus an unconstitutional reaction to the situation. See Jefferson v Southworth, 447 P. Supp. 179, 189 (D. R.I. 1978). Not only is the solitary confinement not justified by an emergency or new factual situation or new penological interest, it has accomplished no useful purpose at all and cannot be justifi-

fied in its present severe form by any purpose whatsoever. Id. at 189. As the Court in Rooney v North Dakota, 196 U.S. 319 (1905) held:

We do not think that the two phrases import the same kind of punishment. Although solitary confinement may involve close confinement, a criminal could be kept in close confinement without being subjected to solitary confinement.

Id. at 326. Thus, petitioner could be kept in close confinement as had been done prior to the reinterpretation of 883-4,114 and the subsequent enactment of the Death Row schedules and NDCS Rule 6(16).

SOME TYPE OF MEANINGFUL PERIODIC REVIEW OF THE ADMINISTRATIVE SEGREGATION OF INMATES SENTENCED TO THE DEATH PENALTY IS CONSTITUTIONALLY REQUIRED.

At the outset, it should be noted that petitioner raised these two periodic review issues in the courts below: (1) to determine the possibility of petitioner's release to the general population, and (2) to determine whether or not petitioner should be given greater privileges while he is confined in administrative segregation. However, in the case at bar, petitioner is raising only the second periodic review issue that the courts below failed to address. Petitioner informed the district court, in his objection to the Magistrate's Report and Recommendation, that the Magistrate failed to address the second periodic review issue. The district court failed to address petitioner's second periodic review issue. The court of appeals summary disposition of petitioner's appeal, to affirm the district court, did not address petitioner's second periodic review issue of whether he should be given greater privileges.

That Operational Memorandum 201.002.101 "Reception of Capital Inmates" specifically requires: "The Team Classification Committee for Housing Unit #4 will review the status of each inmate housed on Death Row in accordance with the established institutional review schedule." The institutional review schedule has been established pursuant to the unpublished decision in Heathman v Benson, CV81-L-227 (D. Neb., Memorandum of Decision dated 9 August 1983 and Judgment dated 4 October 1983) (The Court would not approve a situation in which a prisoner was kept in solitary confinement for a great

length of time for any reason or for no reason at all and ordered that a periodic review schedule and basic guidelines be developed).

The Court in Clark v Brewer, 578 F. Supp. 1501, 1507 (S.D. Ia. 1983), aff'd as modified, 776 F.2d 226 (8th Cir. 1985) found that there is a distinction between being placed in administrative segregation and being retained in administrative segregation. Although the Hewitt Court concluded that the inmate's fifty-day term in administrative segregation did not seriously infringe on his liberty interests, this Court must address itself to the possibility of inmates seeking review of administrative segregation confinement after months or years of retention in administrative segregation. (cites omitted). Id. at 1507. The Court further held in Clark v Brewer, 578 F. Supp. at 1508:

The length of incarceration . . . is an element that affects the weight of the inmate's interest. The longer an inmate is forced to endure the relatively restrictive . . . conditions, the more serious the deprivation of liberty. Accordingly, an inmate's interest in being given greater privileges or being released to GP increases the longer he is retained . . . Burton v Shapp, 574 F. Supp. 637, 639-40 (W.D. Pa. 1983); see Hutto v Finney, 437 U.S. 678, 686-87, 98 S.Ct. 2565, 2571, 57 L.Ed.2d 522 (1978) (length of confinement in conditions materially different from GP is an element in determining what is cruel and unusual punishment); Jackson v Meschum, 699 F.2d 578, 584 (1st Cir. 1983) (long-term confinement itself generates a heightened due process review requirement).

Another question is whether or not an institution and the employees who work for it are bound by their own rules. The question was effectively dealt with in Douglas County Welfare Administration v Parks, 204 Neb. 570, 284 N.W.2d 10 (1979). One of the questions on appeal was whether or not the rules and regulations of an administrative agency governing proceedings before it, duly adopted and within the authority of that agency were as binding as if enacted by the legislature. The Nebraska Supreme Court held that:

"Generally, rules and regulations of an administrative agency governing proceedings before it . . . are as binding as if they were statutes enacted by the Legislature. Likewise, procedural rules are binding upon the agency which enacts them . . . and the agency does not, as a general rule, have the discretion to waive, suspend, or disregard, in a particular case, a validly adopted rule so long as such rule remains in

force."

Id. at 11-12.

The rule to be gleaned from this analysis is that an administrative agency's rules and regulations have the force and effect of statutory law and the agency has no authority to waive its own rules and regulations. Applied to the instant case, the respondents have no right to ignore their own rules and regulations, and those which are intended to govern their conduct. See also, Department of Banking & Finance of State v Wilken, 217 Neb. 796, 353 N.W.2d 145, 148 (1984); Smith v Sorensen, 748 F.2d 427, 431 (8th Cir. 1984)(applied Parks, supra, to Nebraska administrative regulations).

Both Ruiz v Estelle, 503 F. Supp. 1265, 1356 (S.D. Tex. 1980) and Giampetruzzi v Malcolm, 406 F. Supp. 836, 840 (D.C.N.Y. 1975) indicate that the failure by an institution to follow its own rules and regulations constitutes a violation of the injured party's due process rights. Similarly, Mayo v Lane, 867 F.2d 374, 381 n. 5 (7th Cir. 1989), citing Miller v Henman, 804 F.2d 421 (7th Cir. 1986), supports the proposition that a regulation imbued with the binding force of state law creates a liberty interest which is enforceable.

Here we have a situation in which petitioner is allowed to appear once a month before the Housing Unit #4 Team Classification Committee/Segregation Status Review Committee where he is informed that he will not be released to general population or given greater privileges because his sentence structure involves the death penalty. This refusal to conduct any type of meaningful review because petitioner's sentence structure involves the death penalty is contrary to this Court's finding, "The decision whether a prisoner remains a security risk will be based on facts relating to a particular prisoner." Hewitt v Helms, 459 U.S. 460, 477 n. 9 (1983); see Clark v Brewer, 776 F.2d 226, 235 (8th Cir. 1985) and the respondents' own rules and regulations contained in Operational Memorandum 201.002.101 and the Custody Classification Manual.

That prison officials must conduct some type of reasonable, periodic review of an inmate's confinement in administrative segregation is constitutionally required. Hewitt v Helms, 459 U.S. 460,

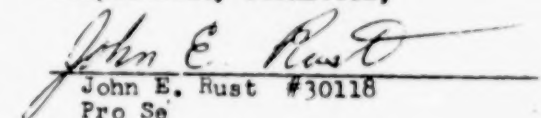
477 n. 9 (1983); Clark v Brewer, 776 F.2d 226, 235 (8th Cir. 1985). Allegations that petitioner is not receiving meaningful reviews of his administrative segregation status states a claim upon which relief can be granted. See Winfrey v Brewer, 570 F.2d 761, 765 n. 5 (8th Cir. 1978); Kelly v Brewer, 525 F.2d 394, 399-400 (8th Cir. 1985). In addition, the Eighth Amendment may require periodic review to insure that conditions of death row confinement do not become cruel and unusual. See Smith v Coughlin, 748 F.2d 783, 787 (2d Cir. 1984); Peterkin v Jeffes, 855 F.2d 1021, 1033 (3d Cir. 1988).

That the mandatory language contained in the Operational Memorandum 201.002.101 and in the Custody Classification Manual have created a liberty interest that requires the respondents to conduct meaningful reviews of petitioner's administrative segregation status for the possibility of granting him greater privileges which may/would alleviate the severity of the solitary confinement conditions while he is retained in administrative segregation. Respondents refusal to comply with their own rules and regulations or to conduct meaningful reviews of petitioner's administrative segregation status is a violation of petitioner's due process rights. See Williams v Armontrout, 831 F.2d 803, 804 (8th Cir. 1987); Hewitt, supra; Mayo v Lane, supra; Ruiz v Estelle, supra; Giampetruzzi v Malcolm, supra; Douglas County Welfare Administration v Parks, supra; Department of Banking & Finance of State v Wilken, supra.

CONCLUSION

It is for these reasons, the petition for certiorari should be granted.

Respectfully submitted,


John E. Rust #30118
Pro Se

P.O. Box 2500
Lincoln, Nebraska 68502-0500

No. 89-2156NE ✓

John R. Rust,

Appellant,

vs.

Frank O. Gunter, Harold W.
Clarke, Gary Grammer,
Francis X. Hopkins, Marion
Peart, John R. Eggers, Roger
Pehrson, Douglas Adams,
Robert Benson, Terry Kiene,
Russell Schuster, Michael R.
Ford, Karl Eisback, each
individually and in their
official capacities, Nebraska
State Penitentiary Housing Unit
#4 Correctional Officers/
Corporals, each individually
and in their official
capacities, Nebraska State
Penitentiary Classification
Committee Members, each
individually and in their
official capacities,

Appellees.

* Appeal from the United States
* District Court for the
* District of Nebraska

This appeal from the United States District Court was
submitted on the record of the district court and briefs of the
parties without oral argument.

After consideration, it is hereby ordered and adjudged that
the judgment of the district court in this cause is affirmed in
accordance with the opinion of this Court. See 8th Cir. R. 12(a).

September 21, 1989 ✓

MANDATE ISSUED, October 17, 1989

A true copy.

ATTEST:

Robert D. St. Vrain

Clerk, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

No. 89-2156

Appellant,

v.

Appellees.

*
*
*
* Appeal from the United States
* District Court for the
* District of Nebraska.

Submitted: August 29, 1989

Filed: September 21, 1989

Before BOWMAN, Circuit Judge, HEANEY, Senior Circuit Judge, and
WOLLMAN, Circuit Judge.

PER CURIAM.

John E. Rust, a death row inmate incarcerated at the Nebraska State Penitentiary (NSP), appeals from a district court order

dismissing his 42 U.S.C. § 1983 action alleging constitutional violations in his initial placement and continued confinement on death row. Rust alleges that his confinement on death row violated his right to due proces and equal protection under the fourteenth amendment, the prohibition of cruel and unusual punishment under the eighth amendment, and the prohibition of ex post facto laws. The district court dismissed Rust's complaint for failure to state a claim. This decision is consistent with our recent opinion in Palmer v. Gunter No. 88-2245 (filed May 24, 1989) (unpublished per curiam). As the questions presented in this case do not require further consideration by this Court, we affirm the district court. See 8th Cir. R. 12(a).

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 88-2245

Charles J. Palmer; Randolph
Reeves,

Appellants,

v.

Frank O. Gunter, Individually,
and as Director of Correctional
Services; Harold W. Clarke,
Individually and as Warden of
Nebraska State Penitentiary;
Gary Grammer, Individually and
as Warden of Nebraska State
Penitentiary; Francis X.
Hopkins, Individually, and as
Deputy Warden of Nebraska State
Penitentiary; Mario Peart, Indi-
vidually, and as Nebraska State
Penitentiary Unit Administrator;
John T. Eggers, Individually and
as Nebraska State Penitentiary
Housing Unit #4 Unit Supervisor
IIs; Robert Benson and Russell
Schuster, Individually, and as
Nebraska State Penitentiary
Housing Unit #4 Unit Supervisors
Is; Nebraska State Penitentiary
Housing Unit #4 Correctional
Officers/Corporals, Individu-
ally, and as Correctional Offi-
cers/Corporals; Nebraska State
Penitentiary Classification
Committee Members, Individually
and as Members of the Institu-
tion Classification Committee,

Appellees.

Appeal from the United States
District Court for the
District of Nebraska.

Submitted: March 3, 1989

Filed: May 24, 1989

Before McMILLIAN, Circuit Judge, HEANEY, Senior Circuit Judge,
and FAGG, Circuit Judge.

PER CURIAM.

Charles J. Palmer and Randolph Reeves, death row inmates incarcerated at the Nebraska State Penitentiary (NSP), appeal pro se from the district court's order dismissing their 42 U.S.C. § 1983 action alleging constitutional violations in their initial placement and continued confinement on death row. We affirm.

Reeves was sentenced to death on September 11, 1981, and after a two-week observation period was transferred to NSP and placed on death row. Palmer was sentenced to death three times after a series of trials, appeals, and retrials for the same crime and each time was placed on death row, in August 1980, in July 1982, and finally on September 6, 1984. Neb. Rev. Stat. § 83-4,114 (reissue 1987), enacted in 1976, allows prison officials to place inmates in solitary confinement "for purposes of institutional control." In November 1984, NSP promulgated a "schedule" which resulted in the solitary confinement of death row inmates. Thereafter, NSP Rule 6(16), was promulgated which essentially mirrored the Nebraska statute allowing solitary confinement for institutional control.

On February 19, 1988, Palmer and Reeves filed the instant section 1983 action against various prison officials alleging: (1) they were denied due process in being placed on death row without having received written statements for the reason of this placement, in violation of a prison regulation promulgated on December 1, 1983; (2) application of Rule 6(16) to them violated the ex post facto clause; (3) the death row classification procedures were improper and inadequate; (4) their segregation based solely on the imposition of a death sentence violates the

equal protection clause; and (5) the ongoing solitary confinement on death row is a per se violation of the eighth amendment.¹

The district court, adopting the detailed and thorough report of the magistrate,² dismissed the action pursuant to 28 U.S.C. § 1915(d) for failure to state a claim. The court concluded that individuals sentenced to death do not have a constitutional or state law liberty interest in being confined in the general prison population because placement on death row, a form of administrative segregation, is mandated by prison regulations. The court further concluded that Palmer's and Reeves's initial-placement claims either provided no basis for relief or were time-barred under the applicable four-year statute of limitations, Neb. Rev. Stat. § 25-208. The ex post facto claim was rejected on the ground that Rule 6(16) does not punish prisoners but allows prison officials to regulate the internal affairs of the institution. Finally, the court concluded that solitary confinement is not a per se eighth amendment violation. This timely appeal followed.

Whether or not a complaint is legally frivolous under 28 U.S.C. § 1915(d) is a question of law and is reviewed under the abuse of discretion standard. Nash v. Black, 781 F.2d 665, 667-68 (8th Cir. 1986). We believe the district court correctly concluded that death row inmates in Nebraska have no liberty interest in being confined in the general prison population. As the court noted, the United States Constitution does not create a protected liberty interest in remaining in the general prison population, but a state may create such an interest through its own constitution, statutes, regulations, or judicial decisions.

¹Palmer and Reeves also claimed Rule 6(16) constituted a bill of attainder and was unconstitutionally vague. The district court's rejection of these claims is not challenged on appeal.

²The Honorable David L. Piester, United States Magistrate for the District of Nebraska.

Hewitt v. Helms, 459 U.S. 460, 466-72 (1983). In the instant case an NSP prison regulation expressly mandates that individuals sentenced to death will be automatically placed on administrative detention status and housed in a separate wing of the prison. Operational Memorandum of the Nebraska Department of Corrections, No. 201.002.101. Accordingly, Palmer's and Reeves's due process claim must fail. See Smith v. Coughlin, 748 F.2d 783, 787 (2d Cir. 1984) (New York law mandating segregation for death row inmates).

Palmer and Reeves also argue that it is a violation of the equal protection clause to treat them differently than other inmates solely on the basis of a death sentence. The district court correctly found no such violation as the stated reasons for segregation of death row inmates, prevention of suicide attempts and escapes, and the security and good order of the institution, are rationally related to NSP's policy concerning these inmates. See id. at 787-88.

The district court also correctly concluded that the ex post facto clause is not implicated by the imposition of solitary confinement on death row inmates because the purpose of such placement is to enhance the orderly administration of the institution and does not constitute an additional punishment. See Malloy v. South Carolina, 237 U.S. 180, 183 (1915) (ex post facto clause does not apply to "conditions deemed necessary for the orderly infliction of humane punishment"). Finally, the district court was correct in concluding that a death row inmate's solitary confinement is not a per se violation of the eighth amendment. See Hancock v. Unknown United States Marshal, 587 F.2d 377, 378-79 (8th Cir. 1978) (per curiam) (solitary confinement of an inmate is not a per se eighth amendment violation); Finney v. Arkansas Bd. of Correction, 505 F.2d 194, 207 (1974) (subsequent history omitted).

Accordingly, we affirm the district court pursuant to 8th
Cir. R. 14.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

-5-

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JOHN E. RUST,)	CV88-L-675
Plaintiff,)	
vs.)	JUDGMENT
FRANK O. GUNTER, et al.,)	
Defendants.)	

For the reasons stated in the report and recommendation of
the magistrate erroneously dated February 22, 1988,

IT IS ORDERED that the action is dismissed for failure of
the complaint to state a claim upon which relief may be granted.

Dated June 16, 1989.

BY THE COURT

James L. Olson
United States District Judge

ENTERED
ON THE DOCKET

JUN 19 1989

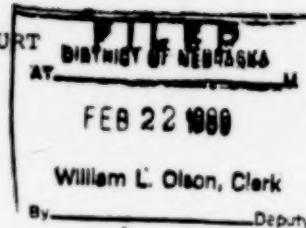
WILLIAM L. OLSON, Clerk

BY *William L. Olson*
Dep. Clerk

FILED	
DISTRICT OF NEBRASKA	
AT _____	_____
JUN 20 1989	
William L. Olson, Clerk	
By _____	Deputy

16

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA



JOHN E. RUST,

Plaintiff,

v.

FRANK O. GUNTER, HAROLD W.
CLARKE, GARY GRAMMER,
FRANCIS X. HOPKINS, MARIO
PEART, JOHN T. EGGERS, ROGER
PEHRSON, DOUGLAS ADAMS,
ROBERT BENSON, TERRY KIENE,
RUSSELL SCHUSTER, MICHAEL R.
FORD, KARL EISBACK, each
individually and in their
official capacities, NEBRASKA
STATE PENITENTIARY HOUSING
UNIT #4 CORRECTIONAL OFFICERS/
CORPORALS, each individually
and in their official
capacities, NEBRASKA STATE
PENITENTIARY CLASSIFICATION
COMMITTEE MEMBERS, each
individually and in their
official capacities,

Defendants.

CV88-L-675

REPORT AND RECOMMENDATION

This is a civil rights action filed pursuant to 42 U.S.C. §1983. The plaintiff is an inmate at the Nebraska State Penitentiary (NSP), who is confined pending a sentence of death. The defendants are the Director of the Nebraska Department of Correctional Services (DCS), the warden of NSP, and various other officials charged with duties pertaining to plaintiff's confinement. The complaint in this action is before the court for initial review pursuant to 28 U.S.C. §1915(d), Fed.R.Civ.P. 12(b)(6), and the local rules of this court. Martin-Trigona v. Stewart, 691 F.2d 856, 858 (8th Cir. 1982). Liberally construing the allegations of the complaint, Haines v. Kerner, 404 U.S. 519, 520-21 (1972), I conclude that plaintiff has failed to state a claim upon which relief may be granted. Because, as explained below, further amendment of the complaint would be futile, I shall recommend dismissal of the action.

Plaintiff raises a number of procedural and substantive challenges to the constitutionality of his confinement on Death Row. The claims are asserted under the Ex Post Facto Clause, the

Due Process and Equal Protection Clauses, the Fourteenth Amendment, and the Cruel and Unusual Punishments Clause of the Eighth Amendment. The complaint is extensive and well-pleaded, providing detailed factual support for these claims. At this stage of the proceeding all properly pleaded factual allegations are taken as true. Cruz v. Beto, 405 U.S. 319, 322 (1975). Rather than attempting to summarize them here, I shall set forth the allegations below, in conjunction with the discussion of the legal issues to which they pertain. It can fairly be said, however, that the crux of plaintiff's claim is a challenge to the authority of prison officials to place him in segregated, solitary confinement solely on the basis of his being sentenced to death.

I. EX POST FACTO CLAUSE

Plaintiff was convicted of first degree murder in the District Court of Douglas County, Nebraska in August of 1975. In October of that year a three-judge panel of that court sentenced plaintiff to death. Plaintiff was transported to NSP, and has been confined in that institution since that date.

From plaintiff's arrival at NSP until October of 1978, inmates under sentence of death were permitted to reside in the general population of the prison. Only when an execution date was fixed for an inmate was he moved to administrative segregation. In October of 1978 this policy was changed; inmates who had been sentenced to death were to be confined in administrative segregation regardless of whether a date had been fixed for the sentence to be carried out. A consent decree entered in an action in this court required certain procedures to be followed before inmates under sentence of death could be reassigned to administrative segregation. Ballew v. Bolin, CV79-L-225 (Order dated June 4, 1980). These procedures were complied with, and inmates sentenced to death were either retained in administrative segregation or moved there from the general population.

In November of 1981 prison officials transferred all of the inmates under sentence of death to D Gallery of the new Housing Unit #4 (the present Death Row). At the time, although the inmates remained on administrative segregation, they allegedly were not subject to solitary confinement. Such confinement came about through the promulgation of Death Row "schedules" by prison officials. Thereafter, DCS Rule 6(16) was adopted. The rule defined the term solitary confinement and prohibited its use for disciplinary purposes, but provided that such confinement could

still be used "for purposes of institutional control."¹ Rule 6(16) was enacted pursuant to Neb. Rev. Stat. §83-4,114, which uses similar language. Plaintiff claims that the promulgation of Rule 6(16) in 1985 and the passage of §83-4,114 in 1976, and their application to him violate the Ex Post Facto Clause since the crimes for which he was imprisoned occurred in 1975.

"An ex post facto law is one which reaches back in time to punish acts which occurred before enactment of the law. A penal statute may also be an ex post facto enactment if it adds a new punishment to the one that was in effect when the crime was committed." Peeler v. Heckler, 781 F.2d 649, 651 (8th Cir. 1986). Plaintiff's claim would appear to fall into the latter definition of an ex post facto law, in that his placement in solitary confinement, according to him, imposes additional punishment which was not imposed at the time he was sentenced.²

The United States Supreme Court has succinctly framed the relevant inquiry in determining whether a particular restriction violates the Ex Post Facto Clause.

The question in each [ex post facto] case, where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of the present situation.

DeVeau v. Braisted, 363 U.S. 144, 160 (1960). The placement of plaintiff in solitary confinement doubtless makes the conditions of his confinement less pleasant. It does not, however, enhance the severity of his sentence. Plaintiff states in the complaint

¹ As quoted by plaintiff, Rule 6(16) provides:

Solitary Confinement is the status of confinement in an individual cell having solid, soundproof doors, and depriving the offender of all visual and auditory contact with other persons. No offender shall be placed in solitary confinement for disciplinary reasons. This provision does not apply to the segregation or isolation of persons for purposes of institutional control.

² Plaintiff alleges that the Douglas County District Court did not order that he be held in solitary confinement pending execution.

that the purpose of placing him and other Death Row inmates in solitary confinement is to enhance the control and safety of the prison, given that inmates under sentence of death have a greater potential for suicide than other inmates and there is a greater risk of attempted escape. These purposes clearly are related to the orderly operation of the prison.

Here, the clear aim of Rule 6(16), as noted above, is to allow prison officials to regulate the internal affairs of the institution. As such, the placement of plaintiff in solitary confinement is not additional punishment, but is a "mere alteration in the conditions deemed necessary for the orderly infliction of humane punishment," which is not forbidden by the Ex Post Facto Clause. Malloy v. South Carolina, 237 U.S. 180, 183 (1915). Accord Glynn v. Auger, 678 F.2d 760, 761 (8th Cir. 1982) (double celling of prisoners after sentencing not violation of Ex Post Facto Clause). See also Dyke v. Meachum, 785 F.2d 267, 268 (10th Cir. 1986) (change in classification system requiring prisoners to serve twenty percent of sentence before eligible for minimum security not violative of Ex Post Facto Clause). Placing plaintiff in solitary confinement pursuant to statutes and rules enacted subsequent to the commission of his offenses does not violate the Ex Post Facto Clause.

II. DUE PROCESS

Plaintiff's due process claims take two forms. First, he claims a liberty interest in being classified initially as any other inmate, with consideration to be given to placement in the general population. Second, he claims a right to "meaningful review" of his segregated confinement by prison officials, again with a view toward placement in the general population. Plaintiff asserts that various Nebraska statutes and DCS regulations entitle him both to initial and ongoing review of his status and, while he is given periodic reviews, they are not meaningful.

The initial inquiry in any due process case is whether there has been a deprivation of a protected interest. Board of Regents v. Roth, 408 U.S. 564, 571 (1972). If no such deprivation has occurred, due process does not require procedural protections. Protected interests may, in a few circumstances, stem from the Constitution itself. Most frequently, however, they are derived from an independent source such as state law. See id.

If plaintiff has a protected interest in being free from administrative segregation which would entitle him to initial or periodic review, it must come from state laws or regulations. The United States Supreme Court has clearly held that no protected interest in being placed or remaining in the general population of a state prison arises from the Constitution itself. Hewitt v. Helms, 459 U.S. 460, 468 (1983). Thus, it is necessary

to examine the state statutes and regulations cited by plaintiff to determine whether they create the protected interest he claims.

A. Initial Placement

Plaintiff's first contention is that the use of solitary confinement is limited to two situations by Nebraska statutes. The first is when a sentencing court directs that solitary confinement be imposed. The second is under §83-4,114, when solitary confinement is used as a control measure. These situations may be the only in which solitary confinement may be imposed as a punitive measure. However, as the Eighth Circuit Court of Appeals has recently recognized, the limitations of §83-4,114 are applicable only to measures taken for disciplinary purposes; where those measures are imposed for legitimate, administrative purposes, the limitations of the statute do not apply. Rust v. Grammer, 858 F.2d 411, 413 (8th Cir. 1988). Indeed, the last sentence of the statute expressly provides that it does not apply to "segregation or isolation for purposes of institutional control." This language makes it clear that there are circumstances other than those outlined in the statute under which solitary confinement may be imposed. The contention that such confinement is permissible under state law in only the two circumstances outlined above must fail.

Plaintiff next contends that Neb. Rev. Stat. §§83-4,109 to 83-4,123 govern the conduct of disciplinary proceedings in Nebraska penal institutions and that these statutes create a protected interest in remaining in the general population. He asserts that these statutes, together with the decision of the United States Supreme Court in Wolff v. McDonnell, 418 U.S. 539 (1974), require a due process hearing to determine whether placement of a particular inmate in solitary confinement is necessary for purposes of institutional control. This claim is without merit. By their own terms, the statutes cited by plaintiff apply only to disciplinary proceedings. See Neb. Rev. Stat. §83-4,109. There is nothing in them which applies to segregation for administrative purposes. Nor is there anything in Wolff which would be applicable to administrative segregation. Wolff dealt exclusively with solitary confinement for disciplinary purposes. These sources do not create the protected interest which plaintiff claims.

Plaintiff next focuses on certain Administrative Regulations (AR's) and Operational Memoranda (OM's) promulgated by DCS and NSP officials. He contends that these regulations together with the Classification Manual affirmatively guarantee him certain rights regarding classification and assignment. He alleges that OM 201.002.101, entitled "Reception of Capital Inmates" provides that all inmates sentenced to the death penalty are to be classified and assigned by the preparation of a classification

study in accordance with the guidelines used for the classification of regular inmates at the Diagnostic and Evaluation Unit of the Lincoln Correctional Center (LCC). Plaintiff alleges that he has never had a classification study under the LCC guidelines.

Plaintiff is correct in alleging that OM 201.002.101, a copy of which is attached to the complaint, provides for such a classification study. It makes this provision, as plaintiff points out, in language which is mandatory. It cannot be the source of a protected interest in confinement of a capital inmate in the general population, however, for two reasons. First, although the language of the OM is mandatory, it places no substantive limitations on the authority of prison officials to classify a capital inmate. It merely mandates a procedure, and procedural requirements cannot, in and of themselves, create protected interests. Olim v. Wakinekona, 461 U.S. 238, 249-50 (1983). Second, and more fundamentally, OM 201.002.101 expressly provides that "capital inmates automatically will be placed on Administrative Detention status and housed on D Wing in Housing Unit #4." This undercuts any claim that the OM creates an interest in favor of a capital inmate in being placed in the general population. I take as true plaintiff's allegation that he has never had a classification study. There is nothing in the OM which would entitle him to such a study as a matter of federal law, however; at most the failure to prepare such a study might give rise to a state law claim. OM 201.002.101 cannot be the source of the protected interest plaintiff claims.

Plaintiff next points to language contained in the Classification Manual, providing for certain procedures in the event an inmate is to be classified and assigned to administrative segregation.³ The language used here, as quoted by plaintiff, is mandatory. Once more, however, the provisions merely dictate procedures. They place no substantive limitations on the authority of prison officials to place inmates in administrative segregation and cannot be the source of a protected interest. Olim, 461 U.S. at 249-50. More importantly, plaintiff alleges that the Classification Manual provides that "written policy and procedure shall provide for special confinement of inmates sentenced to the death penalty." The written policy and procedure for this special confinement is found in OM 201.002.101, which provides for automatic placement

³ These procedures are (1) written notice of reasons for placement in segregated confinement; (2) an impartial hearing before appropriate classification committee within ten working days following the placement in immediate segregation; (3) hearings before the classification committee for periods of up to but not exceeding ninety days; and (4) a written copy of the decision reached at such a hearing.

in administrative segregation. Thus, the procedures generally required for placement in administrative segregation are not applicable to inmates such as plaintiff who are sentenced to death. The Classification Manual cannot be the source of a protected interest in general population placement, nor can it be read to require the application of ordinary classification procedures to capital inmates.

The allegations of the complaint do not state any sort of claim that an inmate sentenced to death has a constitutionally protected interest in placement in the general population as a matter of initial classification. Indeed, they affirmatively disclose that inmates subject to such a sentence will automatically be placed in administrative segregation. This aspect of plaintiff's due process claim is without merit.

B. Periodic Review

Plaintiff also claims that his continued confinement in administrative segregation violates due process. He claims the entitlement to periodic review of the status of such confinement. Plaintiff alleges that he has the opportunity to appear before a Housing Unit #4 segregation status review committee on a monthly basis, and that he has received an annual classification review before the Housing Unit Classification Committee in 1987 and 1988. He contends that these reviews are not "meaningful" in that the result of these reviews--continued confinement in administrative segregation--is foreordained by virtue of his being sentenced to death.

In making the contention that he is entitled to meaningful review, plaintiff relies on language of three court decisions. In Hewitt, the Court stated that administrative segregation cannot be used as a pretext for indefinite confinement of an inmate. Id. at 477 n. 9. He points to similar language in the Eighth Circuit decision of Kelly v. Brewer, 525 F.2d 394 (8th Cir. 1975), and this court's decision in Heathman v. Benson, CV81-L-227 (D. Neb. August 9, 1983) (unreported memorandum). Based on these decisions, plaintiff claims that his continued segregation without meaningful review denies him liberty without due process.

In Heathman, this court addressed, at least partially, a then-existing practice at NSP of placing inmates in disciplinary segregation for periods of years, due to past misconduct. Based on the fact that many of these placements were shortened, as a result of the behavior of the inmate while in segregation, the court rejected the label "disciplinary segregation" and considered the confinement to be administrative. Id., slip op. at 6. In light of this conclusion, the court imposed periodic review requirements on inmates so placed, including a requirement that each inmate be given an opportunity to appear before a

review committee at least once each month. Id. In addition, there is language in the decision which indicates that such review must be "meaningful" in that it must be based on the behavior of the inmate. Id., slip op. at 7.

Kelly involved a similar situation at the Iowa State Penitentiary. There, the court held that the nature of an inmate's offense, even if it involved the killing of a prison employee, did not in and of itself justify indefinite administrative segregation. Id. at 401. Prison officials were therefore required to conduct some sort of periodic review of the segregated confinement. While the officials were free to consider the nature of the inmate's offense as a factor in determining whether to continue segregation, consideration of other objective criteria was also required. Id. at 402.

The implicit assumption of both Kelly and Heathman is that the inmates in those cases had a protected interest in not being confined in administrative segregation. Neither case engages in express discussion of the source of such an interest. It is now clear, however, that the interest does not arise from the Constitution itself. Hewitt, 459 U.S. at 468. Any interest of this sort must arise from state law or regulations. Id. at 469. As discussed above, the state regulations governing the confinement of capital inmates expressly provide that they will be confined in administrative segregation, and therefore do not create a protected interest in confinement in the general population. They are confined there from their arrival at the prison, and remain there so long as they are under sentence of death.⁴ Under these circumstances, the continued confinement of plaintiff in administrative segregation does not deprive plaintiff of any federally protected interest. See Parker v. Cook, 642 F.2d 865, 874 n. 7 (5th Cir. 1981) (Unit B). Plaintiff

⁴ Plaintiff was, as noted above, confined in the general population for approximately the first three years after his arrival at NSP, with the exception of certain periods when a date had been set for his execution. The change in this policy which resulted in his initial placement in administrative segregation was allegedly made in accordance with the consent decree in Ballew, and any protected interest he may have had in remaining in the general population prior to that change was deprived in a manner consistent with due process. Even if it was not, a claim based on that deprivation has been long since time-barred by the applicable statute of limitations. See Epp v. Gunter, 677 F.Supp. 1415, 1419 (D. Neb. 1988) (applicable limitations period to §1983 actions in Nebraska is four year period of Neb. Rev. Stat. §25-207). The fact that plaintiff was once in the general population does not in and of itself give rise to any protected interest; plaintiff may be treated as a capital inmate who has been in segregation since his arrival at NSP.

has no entitlement to "meaningful" review of his status in the sense that the term "meaningful" requires prison officials to actually consider his placement in the general population.⁵

As a capital inmate, plaintiff has no protected interest in placement in the general population either at the time of his arrival at NSP or at any time thereafter so long as he is sentenced to death. A protected interest in general population confinement must arise, if at all, under state law. The regulations governing capital inmates do not create such an interest; instead, they contemplate that segregated confinement will continue so long as the death sentence remains in effect. Since no protected interest exists, it is not necessary that plaintiff be afforded any of the procedural protections to which he claims entitlement. The due process claims provide no basis for relief.

III. EQUAL PROTECTION

Plaintiff contends that the placement of capital inmates in segregated confinement denies him equal protection. He alleges that the sole basis for his segregation is the "conclusive presumption" adopted by prison officials that inmates sentenced to death pose a greater threat to prison security than those who are not. While he states that this presumption has "some intuitive appeal," he contends that it loses weight as applied to him, noting that he has actually accumulated sufficient custody rating points to be classified as a medium security prisoner. He also claims that there are general population inmates at NSP who have a record of violence, suicide, and attempted escape but who are not segregated, while there are capital inmates, apparently including himself, who have no demonstrated record of such problems.

The Equal Protection Clause "is essentially a command that all persons similarly situated should be treated alike." Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985). For the moment, I am willing to assume that capital and non-capital inmates confined in NSP are similarly situated, although

⁵ This does not mean that periodic review may be dispensed with altogether. The Eighth Amendment may require some review of lengthy segregated confinement in order to make certain that the conditions of that confinement do not become "cruel and unusual punishment." See Smith v. Coughlin, 748 F.2d 783, 787 (2d Cir. 1984). Such review would not necessarily mean that prison officials would have to consider placing a capital inmate in the general population, however. A finding that the conditions of segregated confinement were cruel and unusual could be rectified simply by changing the offending conditions, although the inmate would remain on segregated status.

the nature of the sentence imposed on capital inmates makes that assumption by no means clear. Even assuming similar situation, however, equal protection does not require precise uniformity of treatment; states remain free to make certain classifications which impact persons differently. So long as the classifications are not based on suspect criteria such as race, they will withstand equal protection attack if they are reasonably related to a legitimate governmental objective. See, e.g., G.D. Searle & Co. v. Cohn, 455 U.S. 404, 408 (1982); Schweiker v. Wilson, 450 U.S. 221, 230 (1981). There is no allegation that the segregation of capital inmates is based on any sort of suspect classification. See Lee v. Washington, 390 U.S. 333, 334 (1968) (segregation of prisoners based on race). Therefore, the segregation of capital inmates is permissible if it is reasonably related to a legitimate governmental objective.

Even putting aside the broad discretion which federal courts must afford prison officials in matters of institutional security, Spence v. Farrier, 807 F.2d 753, 755 (8th Cir. 1987); Little v. Norris, 787 F.2d 1241, 1244 (8th Cir. 1986), this standard of equal protection review is highly deferential. First, plaintiff bears the burden of demonstrating that the segregation of capital inmates is irrational. "Those challenging legislative judgments must convince the court that the legislative facts could not reasonably be conceived to be true by the governmental decisionmaker." Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (1981). Second, the justifications for the differing treatment need not be expressly described by the prison administrators themselves; this court may take judicial notice of additional considerations which support the judgments made by state officials. Western & Southern Life Ins. Co. v. Board of Equalization, 451 U.S. 648, 674 (1981); United States v. Carolene Products Co., 304 U.S. 144, 154 (1938). Third, this court need not be convinced that the segregation of all capital inmates is the most effective means of achieving the goal of institutional security. So long as the challenged practice "advances a legitimate and identifiable governmental objective, we must disregard the existence of other methods . . . that we as [judges] perhaps would have preferred." Schweiker, 450 U.S. at 235. In the final analysis, so long as "it is evident from all the considerations presented to [prison officials] and those of which we may take judicial notice that the question is at least debatable," the policy must withstand equal protection challenge. Carolene Products, 304 U.S. at 154.

The complaint states that the objective of prison officials in segregating capital inmates is to promote the security and good order of the institution. Clearly, this is a legitimate, if not compelling, governmental interest. Hewitt, 459 U.S. at 468. The segregation of capital inmates is justified by the defendants, according to the complaint, because such inmates pose

a greater risk of suicide, or attempted escape.⁶ Further, although not stated in the complaint, it could reasonably be concluded that capital inmates are more likely to engage in violent attacks on others given their history of violence and the lack of any meaningful additional penalties which could be imposed on them. These factors make it clear that the segregation of capital inmates as a class is reasonably related to the legitimate governmental objective of prison security.

Plaintiff's claim that the segregation of inmates establishes a "conclusive" presumption does not advance the equal protection analysis. Such presumptions are inherent in any sort of legislative or administrative classification. See Weinberger v. Salfi, 422 U.S. 749, 772. They are not constitutionally impermissible so long as they are rational. *Id.* at 768-72. See also Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 22-24 (1976). It is not irrational to conclude that capital inmates pose a greater threat to prison security than other inmates, and treating them as a group, rather than as individuals, is not constitutionally forbidden.

Similarly, plaintiff's allegations that he personally does not pose this type of security threat and that certain general population inmates do cannot provide a basis for an equal protection claim. This is essentially a claim that the classification is over-inclusive, because it applies to capital inmates who, as individuals, may not pose the identified security threats and under-inclusive, because it does not segregate non-capital inmates who may pose the same threats. These concepts simply cannot be considered at this level of equal protection review. As the Supreme Court has noted:

If the classification has some reasonable basis it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality."

Dandridge v. Williams, 397 U.S. 471, 485 (1970). The Eighth Circuit, considering an equal protection challenge to a Missouri rule prohibiting students from being eligible for high school athletics for a year after a transfer to another school, made a similar observation:

Once a rational relationship exists [between

⁶ In Otey v. Best, CV79-L-301, (D. Neb. August 27, 1981), *aff'd*, 680 F.2d 1231 (8th Cir. 1982), this court made specific findings that these concerns presented a legitimate basis for prohibiting a capital inmate from participating in congregate religious services. *Id.*, slip op. at 2.

the rule and the state interest], and it exists here, judicial scrutiny must cease. Whether the rule is wise or creates undue individual hardship are policy decisions better left to legislative and administrative bodies.

In re United States ex rel. Missouri State High School Activities Ass'n, 682 F.2d 147, 152 (8th Cir. 1982).

There is a reasonable relationship between the segregation of capital inmates and the state interest in prison security. The allegations that such a classification is over and under-inclusive, which I take as true, are simply not relevant to the equal protection inquiry. There is nothing in the Constitution which requires the state to make individualized determinations as to whether particular capital inmates are a threat to security. For a federal court to order state officials to undertake a task which would be, to say the least, difficult, would be far too great of an intrusion into the realm of prison administration. The equal protection claim provides no basis for relief.

IV. EIGHTH AMENDMENT

Plaintiff's Eighth Amendment claim is couched in terms similar to his equal protection attack. He contends that his segregated confinement is punishment without penological justification, and therefore is cruel and unusual. Simply stated, plaintiff contends that there is no reason to hold him in segregation.

It must be made clear what this claim is not. Segregation, even involving solitary confinement, is not *per se* unconstitutional. See, e.g., Hancock v. Unknown United States Marshal, 587 F.2d 377, 378-79 (8th Cir. 1978); Finney v. Arkansas Bd. of Correction, 505 F.2d 194, 207 (8th Cir. 1974); Finney v. Hutto, 410 F.Supp. 251, 275 (E.D. Ark. 1976), *aff'd*, 548 F.2d 740 (8th Cir. 1977), *aff'd*, 437 U.S. 678 (1978). Likewise, there is nothing alleged to support a claim that the totality of the physical conditions of plaintiff's confinement amounts to cruel and unusual punishment. Rhodes v. Chapman, 452 U.S. 337, 362-63 (1981) (Brennan, J., concurring); Tyler v. Black, 811 F.2d 424, 433-34 (8th Cir. 1987). Instead, this claim focuses on another aspect of the Cruel and Unusual Punishments Clause: whether the segregated confinement in which plaintiff is held is "totally without penological justification." Rhodes, 452 U.S. at 346 (quoting Gregg v. Georgia, 428 U.S. 153, 183 (1976)).

It does not appear that this question calls for an inquiry any more searching than the equal protection analysis discussed above. Indeed, the Supreme Court has recently indicated that reasonableness is the standard by which the a number of the

constitutional claims of prisoners must be judged. See Turner v. Safley, ___ U.S. ___, 107 S.Ct. 2254, 2261 (1987) (First Amendment claim). As concluded above, the segregated confinement of all inmates sentenced to death is not per se unreasonable. It bears a rational relationship to legitimate penological interests. It would be inappropriate for this court, under the guise of the Eighth Amendment, to require prison officials to make an individualized determination as to which death row inmates are dangerous enough to be segregated and which can be housed in the general population. Prison officials are dealing with individuals who have committed capital crimes, and on whom the judicial system has imposed the ultimate penalty. Given "the qualitative difference of death from all other punishments," Caldwell v. Mississippi, 472 U.S. 320, 329 (1985), the segregation of capital inmates as a class cannot be said to be totally without penological justification.

V. CONCLUSION

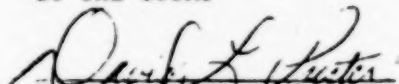
Plaintiff has raised a number of claims in this case, and review of them has required considerable discussion. The essence of the case, as noted initially, goes to the authority of the state to segregate capital inmates from the general prison population. The exhibits to the complaint, the OM and the grievance responses, make it clear that the state does not intend to permit capital inmates to be confined in the general population. Given the lack of a constitutional interest in such confinement, there can be no claim of a constitutionally protected interest; the state would have to create one and it is clear it has not done so. The real issue then is whether, from a substantive standpoint, segregation of capital inmates is permissible. Because the complaint discloses on its face legitimate state interests to be served by such segregation, and because segregation reasonably serves those interests, I conclude that it is permissible. This action should be dismissed.

IT THEREFORE IS HEREBY RECOMMENDED, pursuant to 28 U.S.C. §636(b)(1)(B), that this action be dismissed.

Plaintiff is hereby notified that unless objection is made within eleven days after he is served with a copy of this recommendation, he may be held to have waived any right he may have to appeal the court's order adopting this recommendation.

Dated February 22, 1988.

BY THE COURT


United States Magistrate

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

JOHN E. RUST, Petitioner,

vs.

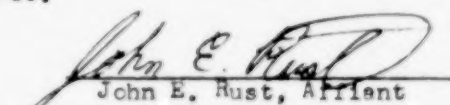
FRANK O. GUNTER, HAROLD W. CLARKE, GARY GRAMMER, FRANCIS X. HOPKINS, MARIO PEART, JOHN T. EGGERS, ROGER PEHRSON, DOUGLAS ADAMS, ROBERT BENSON, TERRY KIENE, RUSSELL SCHUSTER, MICHAEL R. FORD, KARL EISBACK, NEBRASKA STATE PENITENTIARY HOUSING UNIT #4 CORRECTIONAL OFFICERS/ CORPORALS, NEBRASKA STATE PENITENTIARY CLASSIFICATION COMMITTEE MEMBERS, Respondents.

STATE OF NEBRASKA)
COUNTY OF LANCASTER) SS.

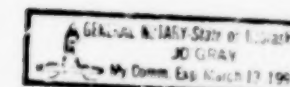
AFFIDAVIT OF SERVICE

THE UNDERSIGNED, John E. Rust, being first duly sworn upon his oath, deposes and states that he is the Petitioner herein; that a copy of the Petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit was sent to Respondents' attorney: Marie C. Pawol, Assistant Attorney General, 2115 State Capitol Building, Lincoln, Nebraska 68509, by United States mail, postage prepaid, this 23d of October 1989.

Further Affiant Sayeth Not.


John E. Rust, Affiant

SUBSCRIBED AND SWORN to before me on this 23 day of Oct 1989.




NOTARY PUBLIC

RESPONSE REQUESTED

ORIGINAL

No. 89-5900

3

Supreme Court, U.S.

FILED

MAR 1 1990

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1989

JOHN E. RUST,

Petitioner,

v.

FRANK O. GUNTER, HAROLD W. CLARKE,
GARY GRAMMER, FRANCIS X. HOPKINS,
MARIO PEART, JOHN T. EGGERS, ROGER
PEHRSON, DOUGLAS ADAMS, ROBERT
BENSON, TERRY KIENE, RUSSELL
SCHUSTER, MICHAEL R. FORD, KARL
EISBACH, each individually and in
their official capacities, NEBRASKA
STATE PENITENTIARY HOUSING UNIT #4
CORRECTIONAL OFFICERS/CORPORALS, each
individually and in their official
capacities, NEBRASKA STATE PENITENTIARY
CLASSIFICATION COMMITTEE MEMBERS, each
individually and in their official capacities,

Respondents.

RECEIVED

MAR 1 1990

OFFICE OF THE CLERK
SUPREME COURT, U.S.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

ROBERT M. SPIRE, #13977
Attorney General

William L. Howland, #11941
Assistant Attorney General
2115 State Capitol
Lincoln, NE 68509-8920
Tel: (402) 471-2682

Attorneys [REDACTED]
on Behalf of Respondents.

QUESTIONS PRESENTED

Did the United States Court of Appeals for the Eighth Circuit correctly affirm the district court's dismissal of petitioner's civil rights complaint upon a determination that allegations that petitioner's segregated confinement on death row violated his constitutional rights failed to state a claim?

LIST OF PARTIES

The petitioner in this action is John E. Rust, an inmate incarcerated at the Nebraska State Penitentiary on death row.

The respondents in this action are Frank O. Gunter, Director of the Nebraska Department of Correctional Services; Harold W. Clarke, Warden of the Nebraska State Penitentiary; Francis X. Hopkins, Deputy Warden of the Nebraska State Penitentiary; Mario Peart, Housing Unit Administrator of the Nebraska State Penitentiary; John Eggers, Roger Pehrson, Douglas Adams, Robert Benson, Terry Kiene, Russell Schuster, Michael R. Ford, and Karl Eisbach, Housing Unit #4 Correctional Officers/Corporals and Unit Management staff; and Nebraska State Penitentiary Classification Committee members, all of whom are officials and employees of the Nebraska Department of Correctional Services.

TABLE OF CONTENTS

Subject	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINIONS BELOW.	1
JURISDICTION.	1
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	
I. The Eighth Circuit Court of Appeals correctly affirmed the District Court's dismissal of Petitioner's complaint for failure to raise a claim	3
CONCLUSION.	8
PROOF OF SERVICE.	9
APPENDIX (CIVIL RIGHTS COMPLAINT WITH ATTACHMENTS). . .	10

TABLE OF AUTHORITIES

<u>Cases Cited</u>	<u>Page</u>
Ex Parte Medley, 134 U.S. 160 (1890)	4,5
Hancock v. Unknown United States Marshal, 587 F.2d 377 (8th Cir. 1978)	7
Hewitt v. Helms, 459 U.S. 460 (1983)	6
Malloy v. South Carolina, 237 U. S. 180 (1915).	5
Palmer v. Gunter, No. 88-22454 (filed May 24, 1989) . .	2
Rooney v. North Dakota, 196 U.S. 319 (1905)	4
Weaver v. Graham, 450 U.S. 24 (1980).	5
<u>Statutes Cited</u>	
28 U.S.C. § 1331.	1
28 U.S.C. § 1254.	1
28 U.S.C. § 1291.	1
28 U.S.C. § 1915(d)	2
42 U.S.C. § 1983.	1
Neb.Rev.Stat. § 83-4,114 (Reissue 1987)	1,3,4

OPINIONS BELOW

This is a Petition for Writ of Certiorari from an unreported decision entered by the United States Court of Appeals for the Eighth Circuit on September 21, 1989. This decision affirmed the June 16, 1988 unreported order of the United States District Court for the District of Nebraska dismissing petitioner's complaint for failure to state a claim. That order was based upon the Report & Recommendation of the United States Magistrate filed February 22, 1988. Each of these decisions are included by petitioner in his appendix.

JURISDICTION

The district court had jurisdiction over this matter pursuant to the provisions of 28 U.S.C. § 1331.

The United States Court of Appeals for the Eighth Circuit had jurisdiction over this matter pursuant to the provisions of 28 U.S.C. §1291.

This Court has jurisdiction over this petition pursuant to the provisions of 28 U.S.C. § 1254.

STATEMENT OF THE CASE

Petitioner filed this civil rights action pursuant to 42 U.S.C. §1983. Petitioner is an inmate at the Nebraska State Penitentiary (NSP) and is residing on death row in that facility.

The respondents are officials and employees of the Nebraska Department of Correctional Services (DCS).

Petitioner was sentenced to death by a three-judge panel of the District Court of Douglas County, Nebraska, in October, 1975. Petitioner was transported to the NSP, where he has remained incarcerated to the present date. From petitioner's arrival at the NSP in October, 1975, until October, 1978, prisoners sentenced to death were allowed to reside in the general population of the prison. In October, 1978, prisoners sentenced to death were removed from the general population and placed in administrative segregation.

Nebraska Revised Statute § 83-4,114 (Reissue 1987), first enacted in 1976, authorizes prison officials to place inmates in

solitary confinement "for purposes of institutional control." Petitioner alleges that in November, 1984, NSP officials promulgated "schedules" which resulted in solitary confinement of death row inmates. Thereafter, NSP officials promulgated Rule 6(16) which essentially mirrored the Nebraska statute authorizing solitary confinement for purposes of institutional control.

On November 29, 1988, petitioner filed a civil rights complaint challenging the authority of prison officials to place him in segregated, solitary confinement solely on the basis of his being sentenced to death. Petitioner specifically claimed that his confinement on death row violates his right to due process and equal protection under the Fourteenth Amendment, the prohibition of cruel and unusual punishment under the Eighth Amendment and the prohibition of ex post facto laws.

The district court, adopting the detailed report of the magistrate, dismissed the action pursuant to 28 U.S.C. § 1915(d). The respondents were never served with the complaint.

Petitioner then appealed this dismissal to the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit found that the district had properly dismissed the complaint sua sponte and affirmed. In affirming the district court, the Eighth Circuit cited its recent decision in Palmer v. Gunter, No. 88-2245 (filed May 24, 1989) (unpublished per curiam), wherein the Eighth Circuit addressed identical issues. In that case, the Eighth Circuit stated:

We believe the district court correctly concluded that death row inmates in Nebraska have no liberty interest in being confined in the general prison population. As the court noted, the United States Constitution does not create a protected liberty interest in remaining in the general prison population, but a state may create such an interest through its own constitution, statutes, regulations or judicial decisions... In the instant case an NSP prison regulation expressly mandates that individuals sentenced to death will be automatically placed on administrative detention status and housed in a separate wing of the prison... Accordingly, [Petitioners'] due process claim must fail...

[Petitioners] also argue that it is a violation of the equal protection clause to treat them differently than other inmates solely as the basis of a death sentence. The district court correctly found no such violation as the stated reasons for segregation of death row inmates, prevention of suicide attempts and escapes,

and the security and good order of the institution, are rationally related to the NSP's policy concerning these inmates...

The district court also correctly concluded that the ex post facto clause is not implicated by the imposition of solitary confinement on death row inmates because the purpose of such placement is to enhance the orderly administration of the institution and does not constitute an additional punishment.... Finally, the district court was correct in concluding that a death row inmate's solitary confinement is not a per se violation of the eighth amendment.... (citations omitted).

[See Petitioner's appendix, id. at 3-4].

The petitioner filed this petition for Writ of Certiorari appealing the Eighth Circuit's affirmance of the dismissal of his complaint. The Nebraska Attorney General's office appears as Amicus on behalf of the respondents because the respondents were never served with the complaint.

REASONS FOR DENYING THE WRIT

I.

THE EIGHTH CIRCUIT COURT OF APPEALS CORRECTLY AFFIRMED THE DISTRICT COURT'S DISMISSAL OF PETITIONER'S COMPLAINT FOR FAILURE TO RAISE A CLAIM.

In filing his civil rights action, petitioner essentially challenged the authority of prison officials to segregate capital inmates from the general prison population. Petitioner raised procedural and substantive challenges to the constitutionality of his confinement on death row under the Ex Post Facto Clause, the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the Cruel and Unusual Punishments Clause of the Eighth Amendment. The district court, adopting the detailed analysis of the magistrate, correctly concluded that no constitutional claim was raised in the complaint. There being no abuse of discretion, the Eighth Circuit's affirmance of the dismissal of petitioner's complaint was in all respects proper.

A. Ex Post Facto Clause.

Neb. Rev. Stat. § 83-4,114 expressly authorizes the segregation or isolation of any inmate "for purposes of institutional control." Prison Rule 6(16) mirrors this statute and, as quoted by petitioner, specifically states that "[n]o offender shall be placed in solitary confinement for disciplinary reasons." Petitioner

asserts that the promulgation of § 83-4,114 and Rule 6(16), both enacted after the occurrence of his crimes in 1975, violate the Ex Post Facto Clause. Yet, petitioner cites no preexisting statute or rule which would have prevented prison officials from placing inmates in solitary confinement for purposes of institutional control.

This Court, in Rooney v. North Dakota, 196 U.S. 319, 325 (1905) defined an ex post facto law as one creating a new offense, aggravating or increasing the enormity of the crime for the commission of which the accused was convicted, or requiring "the infliction upon the accused of any greater or more severe punishment than was prescribed by law at the time of the commission of the offense."

The segregation of petitioner and other capital inmates does not impose an additional punishment or enhance the severity of his sentence. The complaint itself notes that the respondents' rationale for placing death row inmates in administrative segregation is to enhance the control and safety of the prison in view of the greater risk of attempted escapes and suicides for inmates under sentence of death. It is obvious that the challenged rule and statute are "reasonably related" to maintaining the safety and health of inmates and employees of the penal institution.

Petitioner has misinterpreted Ex Parte Medley, 134 U.S. 160 (1890) as a prohibition against solitary confinement because this Court viewed it as an increased punishment. A careful reading of the case reveals that the decision was based on this Court's determination that a newly enacted Colorado statute, which became effective after the defendant's commission of the crime but before sentencing, repealed the former statute and all statutes which were inconsistent with the new statute. Thus, the defendant could not be convicted or sentenced since the former statute had been repealed and a statutory basis for sentencing no longer existed. Id. at 166. The discussion of solitary confinement in Ex Parte Medley was dicta and intimately connected with the Colorado statute

of 1889. The newly enacted statute mandated the use of solitary confinement for inmates sentenced to death, as a punishment.

The factual situation of petitioner's case makes it readily distinguishable from Ex Parte Medley since his conviction and sentence were not based on a new statute to which the State attempted to give retroactive application. Moreover, the challenged Nebraska statute and prison rule do not mandate the use of solitary confinement of death row inmates as a punishment, but authorize its use for any inmate for purposes of institutional control.

Petitioner similarly misconstrues this Court's ruling in Weaver v. Graham, 450 U.S. 24 (1980). In that case, a state statute which reduced the amount of "gain time" deductible from a convicted prisoner's sentence, as applied to persons whose crimes were committed prior to the statute's enactment, was determined to be an unconstitutional ex post facto law. There, the effect of the statute was to increase the term of petitioner's sentence.

The clear aim of the challenged Nebraska statute and prison rule is to allow prison officials to regulate the internal affairs of the institution and to enhance the safety and control of the prison. Inmate assignments to residence units in administrative segregation are based on status, not conduct, within the institution. Thus, the district court and Eighth Circuit correctly determined that the placement of petitioner in solitary confinement on death row does not constitute an additional punishment. Rather, such confinement is an "alteration in the conditions deemed necessary for the infliction of humane punishment" and is not violative of the Ex Post Facto Clause. Malloy v. South Carolina, 237 U.S. 180, 183 (1915).

B. Due Process.

In his complaint, petitioner asserted two due process claims. First, he claimed a liberty interest in being classified initially as any other inmate, with possible placement in general population. Second, petitioner asserted a right to "meaningful review" of his status by prison officials with a view toward placement in the

prison's general population and/or the granting of greater privileges.

The district court correctly concluded that no Nebraska statute or prison rule created any protected interest in being placed or remaining in the general population. See, Hewitt v. Helms, 459 U.S. 460, 468 (1983). To the contrary, language in prison rules cited by petitioner expressly mandate that capitol inmates will be placed on administrative detention status and housed in a separate wing of one of the prison's housing units.

Petitioner asserts that, on appeal, he is only raising the issue of whether he is entitled to "meaningful review" of his status to determine whether he should be granted "greater privileges." He does not assert any facts as to what these privileges are or why he is entitled to them. In his complaint, petitioner asserts that he has the opportunity to appear before a segregation status review committee on a monthly basis and receives an annual classification review. Petitioner contends, however, that these reviews are not "meaningful" because his continued administrative detention is assured solely on the basis of his death sentence.

The district court correctly determined that, as a capitol inmate, petitioner had no protected interest in not being confined in administrative segregation. It follows, therefore, that petitioner has no protected interest in being granted "privileges" inconsistent with such a status.

C. Equal Protection.

In his complaint, petitioner additionally claimed that the placement of capitol inmates in segregated confinement by NSP officials denies him equal protection. The petitioner does not specifically address this issue on appeal to this Court.

Because the petitioner did not assert the existence of any suspect class or fundamental right, the district court analyzed this claim under the rational basis test. Noting that the complaint itself asserted that the objective of prison officials in segregating capitol inmates is to prevent attempted suicides

and escapes, the district court determined that segregation of these inmates was reasonably related to the legitimate governmental objective of prison security. Thus, no equal protection claim was asserted.

D. Eighth Amendment.

Petitioner contends that his administrative confinement on death row is without penological justification because prison officials have created an "irrebuttable" presumption that capitol inmates pose a greater security threat, rather than making a case by case evaluation. The district court properly noted that the Eighth Amendment did not require an individualized determination since, given the qualitative difference of death from other punishments, the segregation of capitol inmates as a class cannot be said to be without penological justification.

It is noteworthy that petitioner did not allege in his complaint that the conditions of his confinement amounted to cruel and unusual punishment. Although petitioner freely and mistakenly uses the term "solitary confinement" to describe his confinement, he asserts no other facts about the conditions of his confinement. The district court properly emphasized that segregation, even involving solitary confinement, is not per se unconstitutional. Hancock v. Unknown United States Marshal, 587 F.2d 377, 378-79 (8th Cir. 1978). It is noteworthy that in a prison grievance response, attached by petitioner to his complaint, petitioner is informed by the Director of the DCS of the following:

You have not been placed in solitary confinement. Because you have been sentenced to death, your housing assignment is not within the general population of the Penitentiary. You are permitted to associate with other inmates who have sentences similar to yours. At this time, I do not intend to alter this Department's policy concerning housing assignments for inmates under sentence of death.

[Appendix, at p.48].

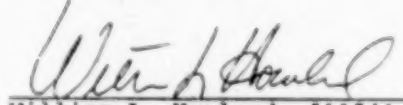
Petitioner failed to allege facts to support a claim that the totality of physical conditions of his confinement amounted to cruel and unusual punishment. Petitioner's claim that his segregated confinement serves no penological purpose is equally

without merit. The lower courts did not err in concluding that petitioner failed to raise any claim under the Eighth Amendment.

CONCLUSION

The district court correctly dismissed petitioner's complaint for failure to assert a claim. Petitioner's complaint essentially raised questions of law only, which were properly analyzed and reviewed by the district court. The Eighth Circuit Court of Appeals properly determined that no constitutional claim is raised by the segregation of death row inmates from prisoners in general population. Petitioner points to no conflict or controversy among the federal circuit courts. No substantial federal question is presented. For all of the reasons set forth above, amicus curiae on behalf of respondents respectfully requests that this Court deny petitioner's Petition for Writ of Certiorari.

BY ROBERT M. SPIRE, #13977
Attorney General

BY 
William L. Howland, #11941
Assistant Attorney General
2115 State Capitol
Lincoln, NE 68509-8920
Tel: (402) 471-2682

Counsel of Record for Amicus Curiae
on behalf of Respondents.

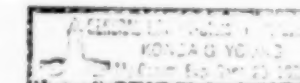
PROOF OF SERVICE

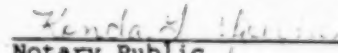
STATE OF NEBRASKA)
COUNTY OF LANCASTER) ss.

I, _____, being first duly sworn, depose and state that two copies of the brief in the above entitled case were served upon the petitioner by depositing said copies in the United States Mail, certified and return receipt postage prepaid, addressed to petitioner, John E. Rust, Nebraska State Penitentiary, P.O. Box 2500, Lincoln, NE 68502, on this ____ day of February, 1990.

Affiant

Subscribed in my presence and sworn to before me this ____ day of February, 1990.




Notary Public

23-320-7

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JOHN E. RUST,

Plaintiff,

-vs-

FRANK O. GUNTER, Individually, and as
Director of Correctional Services;
HAROLD W. CLARKE, Individually, and as
Warden of Nebraska State Penitentiary;
GARY GRAMMER, Individually, and as
Warden of Nebraska State Penitentiary;
FRANCIS X. HOPKINS, Individually, and
as Deputy Warden of Nebraska State
Penitentiary;
MARIO PEART, Individually, and as
Nebraska State Penitentiary Housing
Unit Administrator;
JOHN T. EGGERS, Individually, and as
Nebraska State Penitentiary Housing
Unit #4 Manager;
ROGER PEHRSON, DOUGLAS ADAMS and ROBERT
BENSON, Individually, and as Nebraska
State Penitentiary Housing Unit #4
Unit Supervisor IIs;
TERRY KIENE, RUSSELL SCHUSTER, MICHAEL
R. FORD and KARL EISBACK, Individually,
and as Nebraska State Penitentiary
Housing Unit #4 Unit Supervisor Is;
NEBRASKA STATE PENITENTIARY HOUSING
UNIT #4 CORRECTIONAL OFFICERS/COR-
PORALS, Individually, and as Correc-
tional Officers/Corporals;
NEBRASKA STATE PENITENTIARY CLASSIFICA-
TION COMMITTEE MEMBERS, Individually,
and as Members of the Institution Class-
ification Committee;

Defendants.

INTRODUCTION

This is a civil action, authorized pursuant to 42 U.S.C. §1983,
by plaintiff John E. Rust, a state prisoner under a sentence of
Death and three sentences of 16 2/3 years to 50 years, to redress
the deprivation under color of state law, regulation, custom and/or

REC- 10
NOV 28 1988

U.S. MAGISTRAT.

Civil No. CV 88-L-675

FILED DISTRICT OF NEBRASKA AT _____ NOV 29 1988-2 William L. Olson, Clerk By _____ Deputy

CIVIL RIGHTS COMPLAINT
FOR DECLARATORY AND
INJUNCTIVE RELIEF

usage, certain rights, privileges, and immunities secured to the plaintiff by the Constitution of the United States.

JURISDICTION

1. Original and specific jurisdiction over this civil rights action is conferred on this Court pursuant to 28 U.S.C. §1343 providing for jurisdiction over claims arising under 42 U.S.C. §1983, and 28 U.S.C. §§2201 and 2202 relating to declaratory judgments.

PARTIES

PLAINTIFF

2. Plaintiff John E. Rust is, and at all times relevant herein has been, a prisoner of the State of Nebraska in the custody of the Nebraska Department of Correctional Services, and he is confined in the Nebraska State Penitentiary located at Lincoln, Nebraska, under a sentence of Death and three sentences of 16 2/3 years to 50 years.

DEFENDANTS

3. Defendant Frank C. Gunter (hereinafter referred to as "Gunter") is, and at all times herein relevant has been, the Director of the Nebraska Department of Correctional Services (hereinafter referred to as "NDCS"). He is responsible for the custody, control, and correctional treatment of persons committed to the NDCS and is also responsible for the general administration of the NDCS pursuant to Neb. Rev. Stat. §§83-108.02, 83-171, 83-173, 83-176, 83-178, 83-179, 83-182, 83-922, 83-4,109 to 83-4,123 (Reissue 1987), 29-2204, 29-2519 et seq. (Reissue 1985), the Rules and Regulations of the NDCS, the State of Nebraska Department of Correctional Services Adult Inmate Classification Manual (hereinafter referred to as the "Custody Classification Manual"), and the Con-

stitution of the United States. Defendant Gunter is sued in his individual and official capacities.

4. Defendant Harold W. Clarke (hereinafter referred to as "Clarke") is, and at all times herein relevant has been employed by the NDCS as the Warden of the Nebraska State Penitentiary (hereinafter referred to as the "NSP") since approximately 1 June 1987. In this capacity, defendant Clarke is the Chief Executive Officer of the NSP. He is responsible for the custody, control and correctional treatment of persons confined in the NSP and is also responsible for the general administration of that institution pursuant to Neb. Rev. Stat. §§83-108.02, 83-177, 83-178, 83-179, 83-181, 83-185, 83-4,109 to 83-4,123 (Reissue 1987), 29-2204, 29-2519 et seq. (Reissue 1985), the Rules and Regulations of the NDCS and the NSP, the Custody Classification Manual, and the Constitution of the United States. In addition, defendant Clarke has approved or denied the decisions of the Segregation Status Review Committees, the Unit Team Classification Committees, and the Nebraska State Penitentiary Classification Committee. Prior to defendant Clarke's appointment as Warden of the NSP, he was employed as the Deputy Warden of the NSP, and has served as a member of the Nebraska State Penitentiary Classification Committee which has reviewed and approved the decisions of the Segregation Status Review Committees and the Unit Team Classification Committees. Defendant Clarke is sued in his individual and official capacities.

5. Defendant Gary Grammer (hereinafter referred to as "Grammer") is, and at all times herein relevant has been employed by the NDCS as the Warden of the NSP from approximately 1 April

1985 to approximately 1 June 1987. In this capacity, defendant Grammer was the Chief Executive Officer of the NSP. He was responsible for the custody, control and correctional treatment of persons confined in the NSP, and was also responsible for the general administration of that institution pursuant to Neb. Rev. Stat. §§83-108.02, 83-177, 83-178, 83-179, 83-181, 83-185, 83-4,109 to 83-4,123 (Reissue 1987), 29-2204, 29-2519 et seq. (Reissue 1985), the Rules and Regulations of the NDCS and the NSP, the Custody Classification Manual, and the Constitution of the United States. In addition, defendant Grammer approved or denied the decisions of the Segregation Status Review Committees, the Unit Team Classification Committees, and the Nebraska State Penitentiary Classification Committee. Prior to defendant Grammer's appointment as the Warden of the NSP, he was employed as the Superintendent of the NDCS Diagnostic and Evaluation Unit. As the Superintendent of the NDCS Diagnostic and Evaluation Unit, defendant Grammer had the responsibility of having the appropriate Diagnostic and Evaluation Unit's Classification authority develop an initial Classification Study for each capital inmate committed to the NDCS and then approving or denying the decision and recommendations of said initial Classification Study. Defendant Grammer is presently employed as the Assistant Director of Adult Institutions within the NDCS. Defendant Grammer is sued in his individual and official capacities.

6. Defendant Francis X. Hopkins (hereinafter referred to as "Hopkins") is, and at all times herein relevant has been employed by the NDCS as the Deputy Warden of the NSP. In this capacity, defendant Hopkins has certain responsibilities, powers and duties

delegated to him pursuant to Neb. Rev. Stat. §§83-173 and 83-177 (Reissue 1987) with regard to the management and administration of the Custody Division of the NSP, including Death Row, and he is subject to the provisions of Neb. Rev. Stat. §§83-108.02, 83-178, 83-179, 83-4,109 to 83-4,123 (Reissue 1987), 29-2204, 29-2519 et seq. (Reissue 1985), the Rules and Regulations of the NDCS and the NSP, the Custody Classification Manual, and the Constitution of the United States. In addition, defendant Hopkins has served as a member of the Nebraska State Penitentiary Classification Committee which has reviewed and approved the decisions of the Segregation Status Review Committees and the Unit Team Classification Committees. Defendant Hopkins is sued in his individual and official capacities.

7. Defendant Mario Peart (hereinafter referred to as "Peart") is, and at all times herein relevant has been employed by the NDCS as the Housing Unit Administrator at the NSP. In this capacity, defendant Peart has certain responsibilities, powers and duties delegated to him pursuant to Neb. Rev. Stat. §§83-173 and 83-177 (Reissue 1987) with regard to the management and administration of the Housing Unit Division of the NSP, including Death Row, and he is subject to the provisions of Neb. Rev. Stat. §§83-108.02, 83-178, 83-179, 83-4,109 to 83-4,123 (Reissue 1987), 29-2204, 29-2412 et seq. (Reissue 1985), the Rules and Regulations of the NDCS and the NSP, the Custody Classification Manual, and the Constitution of the United States. In addition, defendant Peart has served as a member of the Nebraska State Penitentiary Classification Committee which has reviewed and approved the decisions of the Segregation Status Review Committees and the Unit Team Classification Commit-

tees. Defendant Peart is sued in his individual and official capacities.

8. Defendant John T. Eggers (hereinafter referred to as "Eggers") is, and at all times herein relevant has been employed by the NDCS as the Housing Unit Manager assigned to Housing Unit #4 of the NSP. In this capacity, defendant Eggers has certain responsibilities, powers and duties delegated to him pursuant to Neb. Rev. Stat. §§83-173 and 83-177 (Reissue 1987) with regard to the day-to-day operation, administration and security of Housing Unit #4, including Death Row, and he is subject to the provisions of Neb. Rev. Stat. §§83-108.02, 83-178, 83-179, 83-182, 83-4,109 to 83-4,123 (Reissue 1987), 29-2204, 29-2519 et seq. (Reissue 1985), the Rules and Regulations of the NDCS and the NSP, the Custody Classification Manual, and the Constitution of the United States. In addition, defendant Eggers is a member of the Housing Unit #4 Unit Team Classification Committee (hereinafter referred to as the "Unit Classification Committee") and the Housing Unit #4 Segregation Status Review Committee. Defendant Eggers is sued in his individual and official capacities.

9. Defendants Roger Pehrson (hereinafter referred to as "Pehrson"), Douglas Adams (hereinafter referred to as "Adams") and Robert Benson (hereinafter referred to as "Benson") are, and at all times herein relevant have been employed by the NDCS as the Housing Unit Supervisor II's assigned to Housing Unit #4 of the NSP. In this capacity, defendants Pehrson, Adams and Benson have certain responsibilities, powers and duties delegated to them pursuant to Neb. Rev. Stat. §§83-173 and 83-177 (Reissue 1987) with regard to

the day-to-day operation, administration and security of Housing Unit #4, including Death Row, and they are subject to the provisions of Neb. Rev. Stat. §§83-108.02, 83-178, 83-179, 83-181, 83-182, 83-4,109 to 83-4,123 (Reissue 1987), 29-2204, 29-2519 et seq. (Reissue 1985), the Rules and Regulations of the NDCS and the NSP, the Custody Classification Manual, and the Constitution of the United States. In addition, defendants Pehrson, Adams and Benson are members of the Unit Classification Committee and the Housing Unit #4 Segregation Status Review Committee. Defendants Pehrson, Adams and Benson are sued in each of their respective individual and official capacities.

10. Defendants Terry Kiene (hereinafter referred to as "Kiene"), Russell Schuster (hereinafter referred to as "Schuster"), Michael R. Ford (hereinafter referred to as "Ford") and Karl Eisback (hereinafter referred to as "Eisback") are, and at all times herein relevant have been employed as Housing Unit Supervisor I's assigned to Housing Unit #4 of the NSP. In this capacity, defendants Kiene, Schuster, Ford and Eisback have certain responsibilities, powers and duties delegated to them pursuant to Neb. Rev. Stat. §§83-108.02, 83-178, 83-179, 83-181, 83-182, 83-4,109 to 83-4,123 (Reissue 1987), 29-2204, 29-2519 et seq. (Reissue 1985), the Rules and Regulations of the NDCS and the NSP, the Custody Classification Manual, and the Constitution of the United States. In addition, defendants Kiene, Schuster, Ford and Eisback are members of the Unit Classification Committee and the Housing Unit #4 Segregation Status Review Committee. Defendants Kiene, Schuster, Ford and Eisback are sued in each of their respective individual and official

capacities.

11. Defendants Nebraska State Penitentiary Housing Unit #4 Correctional Officers/Corporals (hereinafter referred to as the "Correctional Officers/Corporals") are, and at all times herein relevant have been employed by the NDCS as Correctional Officers/Corporals assigned to Housing Unit #4 of the NSP, of which the Corporals are specifically assigned to Death Row. That these Correctional Officers/Corporals are assigned to Housing Unit #4 on a four (4) month rotation. In this capacity, defendants Correctional Officers/Corporals have certain responsibilities, powers and duties delegated to them pursuant to Neb. Rev. Stat. §§83-173 and 83-177 (Reissue 1987) with regard to the day-to-day operation, administration and security of Housing Unit #4, including Death Row, and they are subject to the provisions of Neb. Rev. Stat. §§83-108.02, 83-178, 83-179, 83-181, 83-182, 83-4,109 to 83-4,123 (Reissue 1987), 29-2204, 29-2519 et seq. (Reissue 1985), the Rules and Regulations of the NDCS and the NSP, the Custody Classification Manual, and the Constitution of the United States. In addition, defendants Correctional Officers/Corporals have served as alternate members of the Unit Classification Committee and have served as members of the Housing Unit #4 Segregation Status Review Committee. Defendants Correctional Officers/Corporals are sued in each of their respective individual and official capacities.

12. Defendant Nebraska State Penitentiary Classification Committee Members (hereinafter referred to as the "Institution Classification Committee") are, and at all times herein relevant have been employed by the NDCS assigned as members of the Institution

Classification Committee of the NSP. In this capacity, defendant Institution Classification Committee has certain responsibilities, powers and duties delegated to them pursuant to Neb. Rev. Stat. §§83-173, 83-108.02, 83-177, 83-178 and 83-179 (Reissue 1987) with regard to the management and administration of the classification or reclassification procedures at the NSP, and they are subject to the provisions of Neb. Rev. Stat. §§83-108.02, 83-178, 83-179, 83-182, 83-185, 83-4,109 to 83-4,123 (Reissue 1987), 29-2204, 29-2519 et seq. (Reissue 1985), the Rules and Regulations of the NDCS and the NSP, the Custody Classification Manual, and the Constitution of the United States. In addition to defendants Clarke, Hopkins, and Peart, there are other Institution Classification Committee members whose names are presently unknown to the plaintiff. Also, the defendant Institution Classification Committee approved or denied the decisions of the Housing Unit #4 Segregation Status Review Committees and Unit Classification Committees. Defendant Institution Classification Committee members are sued in each of their respective individual and official capacities.

13. Defendants Gunter, Clarke, Grammer, Hopkins, Peart, Eggers, Pehrson, Adams, Benson, Kiene, Schuster, Ford, Eisback, Correctional Officers/Corporals, and Institution Classification Committee members have acted under "color of state law, regulation, custom and/or usage" at all times relevant to this Complaint.

STATEMENT OF FACTS

14. The plaintiff is a prisoner confined at the NSP under a sentence of Death and three sentences of 16 2/3 years to 50 years and is under a stay of execution issued in connection with the

legal proceedings challenging his convictions and sentences.

15. On approximately 1 August 1975, a jury in the District Court of Douglas County, Nebraska, convicted plaintiff Rust of First Degree Murder in perpetration of or attempt to perpetrate a Robbery and of three (3) counts of Shooting with Intent to Kill, Wound or Maim.

16. On approximately 30 October 1975, in the District Court of Douglas County, Nebraska, a three-judge panel imposed the sentence of Death on plaintiff for First Degree Murder in perpetration of or attempt to perpetrate a Robbery, and the trial judge imposed three (3) sentences of 16 2/3 years to 50 years for each count of Shooting with Intent to Kill, Wound or Maim. In addition, each of the aforesaid four (4) sentences are to be served concurrently.

17. The three-judge panel did not order that plaintiff Rust be kept in solitary confinement for any period of time between the sentence of death and execution thereof.

18. The trial judge expressly ordered that no part of plaintiff Rust's three (3) Shooting with Intent to Kill, Wound or Maim sentences of 16 2/3 years to 50 years are by virtue of each sentence to be spent in solitary confinement.

19. On approximately 30 October 1975, plaintiff Rust was transported to the Nebraska State Penitentiary, where he has been confined since that date.

20. That prisoners sentenced to death were allowed to reside in the general population of the NSP from 1975 through 1978.

21. The administrative policy and practice was that whenever an execution date was fixed for a prisoner sentenced to the death

penalty, said prisoner would be removed from the general population and placed in Administrative Segregation. This policy and practice was promulgated in Rule 6(14)(a)(vii) of Chapter 4 of the Nebraska Department of Correctional Services Administrative Rules and Regulations which stated: "Adult offender sentenced to death penalty and date of execution fixed" (hereinafter referred to as "NDCS Rule 6(14)").

22. That upon receipt of an order which stayed the execution date of a prisoner sentenced to the death penalty, said prisoner would be released from Administrative Segregation and allowed to reside in the general population of the NSP.

23. On approximately 26 October 1977, the Nebraska Supreme Court set an execution date of 23 January 1978 for plaintiff Rust.

24. On approximately 27 October 1977, plaintiff Rust was informed that he was being removed from the general population of the NSP and confined in the NSP's Adjustment Center under Administrative Detention because the Nebraska Supreme Court had set an execution date and that plaintiff Rust would be returned to the general population when he had received a stay of his execution date.

25. On approximately 19 January 1978, plaintiff Rust's execution date was stayed from 23 January 1978 to 24 April 1978.

26. On approximately 17 April 1978, plaintiff Rust received an indefinite stay of execution.

27. That approximately May 1978, former Nebraska Department of Correctional Services Director Joseph Vitek sent a letter to Nebraska Civil Liberties Union Executive Director Barbara Gaither

stating that plaintiff Rust would be reviewed for placement in the general population of the NSP since plaintiff's date of execution was no longer fixed.

28. On approximately 8 June 1978, pursuant to NDCS Rule 6(14), former Deputy Warden Thomas K. Mason sent plaintiff Rust a detailed written explanation which stated that Mr. Mason had reviewed plaintiff's status and had determined that plaintiff would remain in administrative detention due to his still being under the sentence of Death.

29. On approximately 8 June 1978, pursuant to NDCS Rule 6(14), former Deputy Warden Thomas K. Mason sent a similar detailed written explanation to each of the other three (3) prisoners under the death penalty which informed them that they would be confined in administrative detention because they were under the sentence of Death.

30. On approximately 27 October 1978 or 27 November 1978, NDCS Rule 6(14) was revised to provide that an adult offender sentenced to the death penalty would be confined in Administrative Segregation/Detention.

31. In Ballew v Bolin, CV79-L-225 (D. Neb. Consent Order dated 4 June 1980) the United States District Court for the District of Nebraska entered a Consent Order in which the defendants acknowledged that NDCS Rule 6(14) fails to provide adequate due process safeguards to inmates subjected to the rule, and agree, as such, said rule is unconstitutional in that it subjects inmates to a loss of liberty interest without due process procedures in violation of the United States Constitution.

32. That all prisoners sentenced to the death penalty were either retained or placed on Administrative Segregation/Detention status pursuant to NDCS Rule 6(14) as promulgated under Ballew v Bolin, CV79-L-225 (D. Neb. Consent Order dated 4 June 1980).

33. On approximately 21 January 1981, the NSP Administration transferred all the prisoners sentenced to the death penalty from the Adjustment Center to F Gallery in the West Cell Block of the NSP.

34. On approximately 3 November 1981, the NSP Administration transferred all the prisoners sentenced to the death penalty from F Gallery in the West Cell Block to D Gallery in the new Housing Unit #4 at the NSP.

35. That confinement on Administrative Segregation/Detention status pursuant to NDCS Rule 6(14) did not involve solitary confinement until the promulgation of the new Death Row schedules described infra in paragraph 36.

36. On approximately 26 November 1984 and 5 December 1984, defendants Clarke, Peart and Eggers promulgated new Death Row schedules that resulted in the solitary confinement of all the inmates, including the plaintiff, sentenced to the death penalty.

37. Approximately September 1985, Chapter 4 of the Nebraska Department of Correctional Services Administrative Rules and Regulations were revised to repeal and replace NDCS Rule 6(14) with Rule 6(16) of Chapter 4 of the Nebraska Department of Correctional Services Administrative Rules and Regulations (hereinafter referred to as "NDCS Rule 6(16)").

38. That NDCS Rule 6(16) states: "Solitary Confinement. Sol-

itary Confinement is the status of confinement in an individual cell having solid, soundproof doors, and depriving the offender of all visual and auditory contact with other persons. No offender shall be placed in solitary confinement for disciplinary reasons. This provision does not apply to segregation or isolation of persons for purposes of institutional control."

39. That NDCS Rule 6(16) as duly adopted and enacted pursuant to Neb. Rev. Stat. §84-901, et seq. (Reissue 1987) has the full force and effect of law and is as binding as if it was a statute enacted by the legislature. Douglas County Welfare Administration v Parks, 204 Neb. 570, 284 N.W.2d 10 (1979); Smith v Sorensen, 748 F.2d 427, 431 (8th Cir. 1984).

40. The defendants assert that the Administrative Segregation, of all inmates sentenced to the death penalty, for the purpose of institutional control is authorized by Neb. Rev. Stat. §83-4,114 (Reissue 1987) and NDCS Rule 6(16).

41. That Neb. Rev. Stat. §83-4,114 (Reissue 1987) was enacted into law on approximately 10 July 1976 and that NDCS Rule 6(16) was enacted approximately September 1985 which was well after the plaintiff's four (4) criminal offenses were committed on 21 February 1975.

42. The defendants assert that pursuant to Neb. Rev. Stat. §83-4,114 (Reissue 1987) and NDCS Rule 6(16) all inmates under the death penalty have been placed in administrative segregation for the purpose of control and safety since the administrators of the NSP have determined that such inmates have a greater potential for suicide than the average inmate, and there is greater risk of

attempted escape. In addition, administrators have determined that such inmates constitute a threat to the good order, safety, and security of the institution.

43. That Neb. Rev. Stat. §83-4,114 (Reissue 1987), NDCS Rule 6(16), and the 26 November 1984 and 5 December 1984 Death Row schedules violate the Ex Post Facto Clause of the United States Constitution since they retrospectively impose the additional punishment of solitary confinement upon the plaintiff whose criminal offenses were committed on 21 February 1975.

44. That solitary confinement, under Nebraska law, is reserved for these specific instances: (a) pursuant to Neb. Rev. Stat. §29-2204 (Reissue 1985) in all cases when any person shall be convicted of any offense by this (criminal) code declared criminal, and made punishable by imprisonment in the Department of Correctional Services adult correctional facility the trial court shall declare whether any such convict shall be kept in solitary confinement in the cells of the Department of Correctional Services adult correctional facility, without labor, and if so, for what period of time. See, State v Stratton, 220 Neb. 854, 860, 374 N.W.2d 31, 35 (1985); (b) pursuant to Neb. Rev. Stat. §83-4,114 (Reissue 1987) solitary confinement is a disciplinary procedure for purposes of penal administration. Reed v Parratt, 207 Neb. 796, 798, 301 N.W.2d 343, 345 (1981) (Sections 83-4,109 to 83-4,123 constitute a special act relating to disciplinary procedures in adult correctional institutions). See also, Wolff v McDonnell, 418 U.S. 539, 571 n. 19, 94 S.Ct. 2963, 2982 n. 19 (1974).

45. The legislative history of Neb. Rev. Stat. §83-4,109 to

83-4,123 (Reissue 1987) establishes that the purpose of LB 275 is to establish due process standards for disciplinary proceedings administered by the Department of Correctional Services and to bring Nebraska into conformity with the United States Supreme Court ruling in Wolff v McDonnell, 418 U.S. 539, 94 S.Ct. 2963 (1974).

46. That Section 83-4,109 provides specifically: "Disciplinary procedures in adult institutions administered by the Department of Correctional Services shall be governed by the provisions of sections 83-4,109 to 83-4,123."

47. That under Neb. Rev. Stat. §§83-4,109 to 83-4,123 (Reissue 1987) and Wolff v McDonnell, 418 U.S. 539, 94 S.Ct. 2963 (1974) the plaintiff has a right to be placed in and/or to remain in the general population of the NSP.

48. That under Neb. Rev. Stat. §§83-4,109 to 83-4,123 (Reissue 1987) and Wolff v McDonnell, 418 U.S. 539, 94 S.Ct. 2963 (1974) the plaintiff's transfer to or placement in solitary confinement can be triggered only by certain events: violation of certain rules and the creation of a danger to the security of the institution, and that plaintiff may be sent to both disciplinary isolation and/or administrative segregation only after being given a due process hearing to determine if these specified events have occurred.

49. That the defendants have been and are using solitary confinement for both disciplinary isolation and administrative segregation at the NSP.

50. That pursuant to Neb. Rev. Stat. §§83-108.02, 83-178 and 83-179 (Reissue 1987), Administrative Regulation 201.1 "Adult Inmate Classification and Assignment - Administrative Organization"

(hereinafter all "Administrative Regulations" will be referred to as "AR"), AR 201.2 "Adult Inmate Classification and Assignment - Initial Classification, Reception and Orientation, the Custody Classification Manual, and Operational Memorandum 201.002.101 "Reception of Capital Inmates" (hereinafter all "Operational Memorandum" will be referred to as "OM"), the plaintiff is affirmatively guaranteed certain rights to classification and assignment. That under AR 201.1, AR 201.2, and the Custody Classification Manual the NSP officials have promulgated written policies and procedures to implement such rights.

51. That pursuant to AR 201.1, AR 201.2, and the Custody Classification Manual, defendants Clarke and Grammer have promulgated and revised OM 201.001.101 "Unit Classification", OM 201.002.101 "Reception of Capital Inmates", OM 201.002.102 "Initial Classification", and OM 201.003.102 "Inmate Orientation Program".

52. That the Custody Classification Manual provides: "Written policy and procedure shall provide for special confinement of inmates sentenced to the death penalty."

53. That OM 201.002.101 "Reception of Capital Inmates" (hereinafter referred to as "OM 201.002.101") provides that all inmates sentenced to the death penalty are to be classified and assigned by the preparation of a Classification Study that will be completed in accordance with LCC guidelines. A true and correct copy of OM 201.002.101 as effective 22 June 1987, is attached hereto as Exhibit 1 and incorporated herein by this reference.

54. That plaintiff Rust has never had a Classification Study developed under the LCC or NSP guidelines.

55. On approximately 19 March 1986, the Unit Classification Committee informed plaintiff Rust of his placement on the NDCS Classification System via the Reclassification Action Form.

56. That on approximately 18 February 1987 and 17 February 1988, plaintiff Rust appeared before the Unit Classification Committee for his required annual classification review and was again reclassified to Administrative Confinement status at each of these annual classification reviews.

57. That the NDCS Classification System provides for the classification and assignment of an inmate to the following six (6) types of condition status: General Population, Administrative Confinement, Intensive Management, Protective Custody, Special Programs Needs, and Other _____.

58. That the NDCS Classification System designates three (3) types of Administrative Segregation: Administrative Confinement, Intensive Management, and Protective Custody.

59. The Custody Classification Manual sets forth, in mandatory language, the following procedures which shall be complied with when classifying and assigning any inmate to Administrative Segregation: (a) written notice of reasons for placement in segregated confinement, (b) impartial hearing before appropriate classification committee within ten (10) working days following the review for immediate segregation and said inmate shall receive a minimum of forty-eight (48) hours written notice of this hearing, (c) hearing before institutional classification committee for periods of up to but not exceeding ninety (90) days; inmates may be referred to the Director's Sub-Committee for consideration for administrative

confinement or protective custody in excess of ninety (90) days, (d) provided with a written decision after the hearing.

60. That the Unit Classification Committee's classification and assignment of plaintiff Rust to Administrative Confinement on approximately 19 March 1986, 18 February 1987 and 17 February 1988 has resulted in plaintiff being classified and assigned to solitary confinement. In addition, the Institution Classification Committee, defendants Grammer, Clarke and Gunter have approved the Unit Classification Committee's classification and assignment of plaintiff to Administrative Confinement/solitary confinement.

61. That pursuant to Neb. Rev. Stat. §§83-4,109 to 83-4,123 (Reissue 1987); Wolff v McDonnell, 418 U.S. 539, 94 S.Ct. 2963 (1974); and the Custody Classification Manual the plaintiff has a right to receive the mandatory due process procedures that are required to be complied with when classifying and assigning any inmate to segregation or isolation that results in solitary confinement.

62. That both non-capital inmates and capital inmates are classified and assigned to Administrative Confinement status.

63. That the non-capital inmates, who are classified and assigned to Administrative Confinement status, are afforded the mandatory due process procedures described in paragraph 59, supra.

64. That the capital inmates, who are classified and assigned to Administrative Confinement status, are not afforded the mandatory due process requirements described in paragraph 59, supra.

65. That plaintiff Rust has never been afforded any of the mandatory due process requirements set forth in Neb. Rev. Stat.

883-4,109 to 83-4,123 (Reissue 1987); Wolff v McDonnell, *supra*; and the Custody Classification Manual when he was classified and assigned to Administrative Confinement status which resulted in solitary confinement.

66. That plaintiff Rust's sentence structure, which involves a death sentence, is/was the sole determinant for his classification and assignment to Administrative Confinement status.

67. That administrative segregation may not be used as a pretext for indefinite confinement of an inmate. Hewitt v Helms, 459 U.S. 460, 477 n. 9, 103 S.Ct. 864, 874 n. 9 (1983). See also, Heathman v Benson, CV81-L-227, slip op. at 6 (D. Neb. Memorandum date 9 August 1983)(I cannot approve a situation in which the committee could keep a prisoner in solitary confinement for a great length of time for any reason or for no reason at all).

68. That some type of reasonable, periodic review of an inmate's confinement in administrative segregation is constitutionally required. Hewitt v Helms, 459 U.S. 460, 477 n. 9, 103 S.Ct. 864, 874 n. 9 (1983); Clark v Brewer, 776 F.2d 226, 235 (8th Cir. 1985). See also, Smith v Coughlin, 748 F.2d 783, 787 (2d Cir. 1984)(lengthy segregated confinement of the type (death row) considered herein, after an inordinate lapse of time, may necessitate periodic review to insure that conditions once constitutional have not become cruel and unusual).

69. That pursuant to Heathman v Benson, CV81-L-227 (D. Neb. Memorandum of Decision dated 9 August 1983 and Judgment dated 4 October 1983) the NDCS and the NSP established an institutional review schedule and designated that the Segregation Status Review

Committee(s) shall review the status of all inmates assigned to segregated confinement status. The Segregation Status Review Committees' review schedule is set forth in the Custody Classification Manual.

70. That pursuant to Heathman v Benson, *supra*, the NDCS and the NSP adopted and promulgated a basic set of guidelines for the determination of an inmate's removal from segregated confinement status. The aforesaid guidelines are set forth in the Custody Classification Manual.

71. That OM 201.002.101 does not require the permanent retention of any capital inmate, including plaintiff Rust, in Administrative Segregation between the sentence of death and the execution thereof.

72. That OM 201.002.101 specifically requires: "The Team Classification Committee for Housing Unit #4 will review the status of each inmate housed on Death Row in accordance with the established institutional review schedule." The established institutional review schedule has been established pursuant to Heathman v Benson, *supra*.

73. That the Housing Unit #4 Segregation Status Review Committee holds a review hearing once a month which inmates sentenced to the death penalty can attend. The decisions of this monthly segregation status review are approved or denied by the defendants, Institution Classification Committee, Grammer, and Clarke.

74. That each inmate who appears before the Housing Unit #4 Segregation Status Review Committee receive a carbon copy of the Segregation Status Review Sheet completed for that month's review

hearing. A true and correct copy of one of plaintiff Rust's monthly Segregation Status Review Sheets is attached hereto as Exhibit 2 and incorporated herein by this reference.

75. Plaintiff Rust has requested, on several occasions, that the Housing Unit #4 Segregation Status Review Committee conduct a meaningful review of his segregated confinement status to consider either of the following: placement in the general population and/or to be given greater privileges while he is confined under Administrative Segregation.

76. That the Housing Unit #4 Segregation Status Review Committee refuses to conduct any type of meaningful review of plaintiff Rust's segregated confinement status to consider plaintiff for possible placement in the general population and/or for the possibility of being given greater privileges while he is confined under Administrative Segregation because the plaintiff's sentence structure contains the death penalty.

77. That the United States Court of Appeals for the Eighth Circuit in Kelly v Brewer, 525 F.2d 394 (1975) held that a criminal conviction cannot constitutionally be used to keep a convicted inmate indefinitely confined in administrative segregation.

78. That defendants Eggers, Pehrson, Adams, Benson, Kiene, Schuster, Ford, Eisback, and Correctional Officers/Corporals have consistently refused to comply with the mandates of Hewitt v Helms, supra; Clark v Brewer, supra; Kelly v Brewer, supra; Heathman v Benson, supra; the Custody Classification Manual; and OM 201.002. 101 when they refuse to hold and conduct any type of meaningful review of plaintiff Rust's segregated confinement status at the

hearings held by the Housing Unit #4 Segregation Status Review Committees.

79. That the term "Death Row" is utilized within the NDCS and the NSP to denote those inmates sentenced to the death penalty, or the Administrative Confinement status of those inmates sentenced to the death penalty, or for "D" Gallery in Housing Unit #4 at the NSP.

80. The reasons that are asserted by the defendants for the NDCS and the NSP policy of classification and assignment of all inmates, under the death penalty, to Administrative Segregation for purposes of institutional control are that the defendants have determined that such inmates have a greater potential for suicide than the average inmate, and there is greater risk for attempted escape. In addition, defendants have determined that such inmates constitute a threat to the good order, safety, and security of the institution.

81. That the defendants' determinations, as set forth in paragraph 80, constitute "conclusive" or "irrebuttable" presumptions.

82. That these "conclusive" or "irrebuttable" presumptions make a death sentence the sole determinant for the administrative segregation and/or solitary confinement of an inmate sentenced to the death penalty.

83. That these "conclusive" or "irrebuttable" presumptions may have some intuitive appeal, but no basis in fact when such generalized presumptions are used in determining to confine and/or to retain plaintiff Rust in Administrative Segregation and/or solitary confinement.

84. That plaintiff Rust's death sentence and/or sentence structure was/is the sole determinant for his classification and assignment to solitary confinement under the segregated status of Administrative Confinement.

85. That the defendants refuse to provide the inmates, under the death penalty, the same opportunity to be classified and assigned to the general population, just as any other non-capital inmate is classified and assigned to the general population.

86. That there are general population inmates within the NDCS who have a track record of violence, escape, attempted escape, or attempted suicide. That these inmates are not in administrative segregation, while inmates under the death penalty, with no demonstrated record of problems, are classified and assigned to administrative segregation based solely on their death sentences which are based on "conclusive" or "irrebuttable" presumptions.

87. That the defendants cannot constitutionally classify and assign an inmate, sentenced to the death penalty, to some sort of administrative segregation/solitary confinement without any clearly identifiable and articulable reason(s) relating to that particular inmate.

88. That plaintiff Rust had accumulated sufficient custody rating points to have his custody grade considered for reclassification to medium custody.

89. That on approximately 17 February 1988, the Unit Classification Committee recommended an override to retain maximum custody, as plaintiff Rust is on Death Row. That the defendants Institution Classification Committee and Clarke approved this

recommendation, and that the Director's Review Committee overrode plaintiff Rust's medium custody rating to retain maximum custody, as plaintiff was/is on Death Row.

90. That on approximately 20 June 1988, plaintiff Rust submitted a Step One Grievance to the Chief Executive Officer of the NSP, and on approximately 28 June 1988, defendant Hopkins responded for the Chief Executive Officer. A true and correct copy of the Step One Grievance is attached hereto as Exhibit 3 and incorporated herein by this reference.

91. That on approximately 1 July 1988, plaintiff Rust submitted a Step Two Grievance appealing the results of the Step One Grievance, and on approximately 7 July 1988, defendant Grammer acting for defendant Gunter responded. A true and correct copy of the Step Two Grievance is attached hereto as Exhibit 4 and incorporated herein by this reference.

92. That defendants Eggers, Pehrson, Adams, Benson, Kiene, Schuster, Ford, Eisback, and Correctional Officers/Corporals do not receive any special training to work on Death Row and/or with the inmates under the death penalty.

LEGAL CLAIMS

93. Plaintiff Rust complains that the facts heretofore related disclose a systematic and concerted effort by the defendants and their agents to deprive plaintiff of the rights, privileges and immunities secured to the plaintiff by the Constitution of the United States, or the laws of Nebraska, including, but not limited to those enumerated in the succeeding paragraphs.

FIRST CAUSE OF ACTION

94. Plaintiff incorporates by reference the allegations contained in paragraphs 1 through 14 inclusive, 15 through 93 of this Complaint.

95. In order for a law to be ex post facto, it must be retrospective, applying to events occurring before its enactment, and must disadvantage the offender affected by it.

96. A new administrative interpretation which subjects a prisoner already sentenced to more severe punishment has the same effect as a new statute lengthening his present term or a new court decision making what was lawful when done a crime, and is prohibited by the Ex Post Facto Clause.

97. A statute or regulation violates the ex post facto clause when it alters the punitive conditions outside the sentence.

98. It is the effect, not the form, of the law that determines whether it is ex post facto.

99. Prison regulations adopted pursuant to a legislative directive are subject to the same ex post facto scrutiny as direct legislative enactments.

100. For ex post facto purposes, whether a retrospective state statute or regulation ameliorates or worsens conditions imposed by its predecessor is a federal question and the inquiry looks to the challenged provision and not to any special circumstances which might mitigate its effect on the particular individual.

101. That Neb. Rev. Stat. §83-4,114 (Reissue 1987), NDCS Rule 6(16), or the 26 November 1984 and 5 December 1984 Death Row schedules were enacted after plaintiff Rust's criminal offenses were

committed on 21 February 1975.

102. That under Nebraska law, Neb. Rev. Stat. §83-4,109 to 83-4,123 (Reissue 1987) and Wolff v McDonnell, 418 U.S. 539, 571 n. 19 (1974), solitary confinement constitutes a disciplinary procedure which can be triggered only by certain events: violation of certain rules and the creation of a danger to the good order, safety, and security of the institution.

103. The defendants have utilized Neb. Rev. Stat. §83-4,114 (Reissue 1981), NDCS Rule 6(16), or the 26 November 1984 and the 5 December 1984 Death Row schedules to retrospectively impose the more onerous additional punishment of solitary confinement on plaintiff Rust whose criminal offenses were committed prior to their enactment/promulgation.

104. The defendants have utilized §83-4,114, NDCS Rule 6(16), or the 26 November 1984 and the 5 December 1984 Death Row schedules to usurp the trial court's jurisdiction, under Neb. Rev. Stat. §29-2204 (Reissue 1985), to impose solitary confinement on plaintiff Rust.

105. The aforesaid actions of the defendants under color of state law deprived plaintiff Rust of rights, privileges and immunities secured by the Ex Post Facto Clause of Article I, Section 10 of the United States Constitution, for which plaintiff is entitled to seek redress pursuant to 42 U.S.C. §1983.

106. As a proximate result of defendants' unlawful acts as alleged herein, plaintiff Rust has suffered and continues to suffer physical and mental pain and suffering for which he is entitled to recover compensatory damages. Defendants' conduct as alleged

herein demonstrates evil intent or reckless and callous indifference to plaintiff's federally-protected rights, and plaintiff is therefore entitled to recover punitive damages.

SECOND CAUSE OF ACTION

107. Plaintiff Rust incorporates by reference the allegations contained in paragraphs 1 through 14 inclusive, 36 through 67, and 79 through 93 of the Complaint.

108. That under Nebraska law, Neb. Rev. Stat. §§83-4,109 to 83-4,123 (Reissue 1987) and Wolff v McDonnell, 418 U.S. 539, 571 n. 19 (1974), solitary confinement constitutes a disciplinary procedure.

109. The Nebraska statutes, NDCS Administrative Regulations, NSP Operational Memorandums, OM 201.002.101, and the Custody Classification Manual create a liberty interest that plaintiff Rust will be classified and assigned just as any other non-capital inmate is to be classified.

110. That Neb. Rev. Stat. §§83-4,109 to 83-4,123 (Reissue 1987) and Wolff v McDonnell, 418 U.S. 539 (1974) create a liberty interest that plaintiff Rust is entitled to be confined in the general population and that his transfer to or placement in Administrative Segregation/solitary confinement can be triggered only by certain events: violation of certain rules and/or the creation of a danger to the good order, safety, and security of the institution, and only after being afforded due process procedures to determine whether these specified events have occurred.

111. The defendants have arbitrarily, capriciously and summarily refused to provide plaintiff Rust with the full panoply of due

process procedures when he was classified and assigned to the segregated confinement status of Administrative Segregation/solitary confinement.

112. The defendants' official practice and policy is to confine all the inmates under Administrative Segregation status in solitary confinement, pursuant to Neb. Rev. Stat. §§83-4,114 (Reissue 1987) and NDCS Rule 6(16), for purposes of institutional control.

113. The defendants arbitrarily, capriciously and summarily created and apply "conclusive" or "irrebuttable" presumptions to make a death sentence the sole determinant for the administrative segregation/solitary confinement of all inmates under the death penalty.

114. The defendants classify and assign all inmates, sentenced to the death penalty, to Administrative Segregation/solitary confinement without ascertaining any clearly identifiable and articulable facts relating to a particular inmate.

115. The defendants utilized plaintiff Rust's death sentence and/or sentence structure as the sole determinant to classify and assign him to the segregated confinement status of Administrative Segregation/solitary confinement.

116. The defendants subject plaintiff Rust, and other inmates under the death penalty, to a less stringent standard of classification and assignment than is generally applicable to all other non-capital inmates who are convicted and sentenced under the Nebraska Criminal Code.

117. The defendants subject plaintiff Rust, and other inmates under the death penalty, to a less stringent standard for classifica-

tion and assignment to administrative segregation/solitary confinement than is applicable to all other non-capital inmates who are classified and assigned to administrative segregation/solitary confinement.

118. The defendants refuse to confine plaintiff Rust in the general population or in conditions that closely approximate those of the general population solely because plaintiff is under the death sentence.

119. The aforesaid actions of the defendants under color of state law deprived plaintiff Rust of rights, privileges and immunities secured by the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, for which plaintiff is entitled to seek redress pursuant to 42 U.S.C. §1983.

120. As a proximate result of defendants' unlawful acts alleged herein, plaintiff Rust has suffered and continues to suffer physical and mental pain and suffering from which he is entitled to recover compensatory damages. Defendants' conduct as alleged herein demonstrates evil intent or reckless and callous indifference to plaintiff's federally-protected rights, and plaintiff is therefore entitled to recover punitive damages.

THIRD CAUSE OF ACTION

121. Plaintiff Rust incorporates by reference the allegations contained in paragraphs 1 through 14 inclusive, 15 through 93 of this Complaint.

122. The defendants arbitrarily, capriciously and summarily create and apply "conclusive" or "irrebuttable" presumptions to

make a death sentence the sole determinant for the administrative segregation/solitary confinement of all inmates under the death penalty.

123. The defendants classify and assign all inmates, sentenced to the death penalty, to administrative segregation/solitary confinement without ascertaining any clearly identifiable and articulable facts relating to a particular inmate.

124. The defendants utilized plaintiff Rust's death sentence and/or sentence structure as the sole determinant to classify and assign him to the segregated confinement status of Administrative Segregation/solitary confinement.

125. The defendants refuse to confine plaintiff Rust, or any inmate sentenced to the death penalty, in the general population or in conditions that closely approximate those of the general population solely because they are under the death penalty.

126. The defendants arbitrarily, capriciously and summarily refuse to provide plaintiff Rust with the full panoply of due process procedures when he was classified and assigned to the segregated confinement status of Administrative Segregation/solitary confinement.

127. That under Nebraska law, Neb. Rev. Stat. §§83-4,109 to 83-4,123 (Reissue 1987) and Wolff v McDonnell, 418 U.S. 539, 571 n. 19 (1974), solitary confinement constitutes a disciplinary procedure which can be triggered only by certain events: violation of certain rules and the creation of a danger to the good order, safety, and security of the institution.

128. The defendants subject plaintiff Rust, and other inmates

under the death penalty, to a less stringent standard of classification and assignment to administrative segregation/solitary confinement than is applicable to all other non-capital inmates who are classified and assigned to administrative segregation/solitary confinement.

129. The defendants' Administrative Segregation/solitary confinement of plaintiff Rust is punishment without penological justification.

130. Plaintiff Rust constitutionally be confined in Administrative Segregation/solitary confinement without a reason.

131. The aforesaid actions of the defendants under color of state law deprived plaintiff Rust of rights, privileges and immunities secured by the Eighth Amendment to the United States Constitution, as that Amendment is made applicable to the states by the Fourteenth Amendment thereto, for which plaintiff is entitled to seek redress pursuant to 42 U.S.C. §1983.

132. As a proximate result of defendants' unlawful acts as alleged herein, plaintiff Rust has suffered and continues to suffer physical and mental pain and suffering for which he is entitled to recover compensatory damages. Defendants' conduct as alleged herein demonstrates evil intent or reckless and callous indifference to plaintiff's federally-protected rights, and plaintiff is therefore entitled to recover punitive damages.

FOURTH CAUSE OF ACTION

133. Plaintiff Rust incorporates by reference the allegations contained in paragraphs 1 through 14 inclusive, and 66 through 84 of this Complaint.

134. Defendants Eggers, Pehrson, Adams, Benson, Schuster, Ford, Kiene, Eisback, and Correctional Officers/Corporals arbitrarily, capriciously and summarily refuse to comply with or follow the mandates of Hewitt v Helms, 459 U.S. 460, 477 n. 9 (1983); Clark v Brewer, 776 F.2d 226, 235 (8th Cir. 1985); Kelly v Brewer, 525 F.2d 394 (8th Cir. 1974); Heathman v Benson, CV81-L-227 (D. Neb. Memorandum of Decision dated 9 August 1983 and Judgment dated 4 October 1983); OM 201.002.101 or the Custody Classification Manual in that they refuse to hold and conduct any type of meaningful review of plaintiff Rust's segregated confinement status of Administrative Segregation/solitary confinement to determine the possibility of plaintiff's placement in the general population and/or to be given greater privileges while plaintiff is confined in Administrative Segregation/solitary confinement.

135. Defendants subject plaintiff Rust to a more stringent standard of segregated confinement status review than those generally applicable to all other non-capital inmates in the segregated confinement status of Administrative Segregation/solitary confinement.

136. The Housing Unit #4 Segregation Status Review Committee refuses to hold or conduct any type of meaningful review of plaintiff Rust's segregated confinement status because he is on Death Row and because of his sentence structure.

137. The aforesaid actions of the defendants under color of state law deprived plaintiff Rust of rights, privileges and immunities secured by the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, for

which plaintiff is entitled to seek redress pursuant to 42 U.S.C. §1983.

138. As a proximate result of defendants' unlawful acts as alleged herein, plaintiff Rust has suffered and continues to suffer physical and mental pain and suffering from which he is entitled to recover compensatory damages. Defendants' conduct as alleged herein demonstrates evil intent or reckless and callous indifference to plaintiff's federally-protected rights, and plaintiff is therefore entitled to recover punitive damages.

EQUITY

139. Plaintiff Rust has no plain or adequate or complete remedy at law to redress the wrongs described herein. Plaintiff has been and will continue to be irreparably injured by the conduct of the defendants unless this Court grants the declaratory and injunctive relief which plaintiff seeks.

RELIEF

WHEREFORE, plaintiff John E. Rust prays for and requests this Court to grant the following relief:

1. That this Court enter a Declaratory Judgment to adjudge and declare that defendants, and each of them, through their individual and collective policies, practices, acts and omissions complained of herein, have subjected and are subjecting plaintiff to:

(a) denial of the rights, privileges and immunities in contravention of 42 U.S.C. §1983 and the Ex Post Facto Clause of Article I, Section 10 of the United States Constitution as enumerated in the plaintiff's First Cause of Action;

(b) denial of the liberty interest created pursuant to Neb. Rev. Stat. §§83-4,109 to 83-4,123 (Reissue 1987) and Wolff v McDonnell, 418 U.S. 539, 94 S.Ct. 2963 (1974) to be placed in and/or to remain in the general population of the NSP;

(c) the transfer to and/or placement in Administrative Segregation/solitary confinement without the occurrence of certain events: violation of certain rules and/or the creation of a danger to the good order, safety, and security of the institution;

(d) the disciplinary procedure of solitary confinement without being afforded any type of minimum due process procedures to determine whether plaintiff was responsible for the occurrence of these events;

(e) the arbitrary, capricious and summary creation and application of "conclusive" or "irrebuttable" presumptions to make a death sentence the sole determinant for the administrative segregation/solitary confinement of all inmates under the death penalty;

(f) the classification and assignment to Administrative Segregation/solitary confinement without ascertaining any clearly identifiable and articulable facts relating to plaintiff Rust;

(g) the arbitrary, capricious and summary use of plaintiff's death sentence and/or sentence structure as the sole determinant to classify and assign him to the segregated confinement status of Administrative Segregation/solitary confinement;

(h) less stringent standards for classification and assignment to Administrative Segregation/solitary confinement than is generally applicable to all other non-capital inmates who are

classified and assigned to Administrative Segregation/solitary confinement;

(i) less stringent standard for classification and assignment of plaintiff, due to his sentence structure and/or death sentence, than is generally applicable to all other non-capital inmates who are convicted and sentenced under the Nebraska Criminal Code;

(j) the denial of due process of law and of equal protection of law in contravention of 42 U.S.C. §1983 and the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution as enumerated in plaintiff's Second Cause of Action;

(k) punishment without penological justification in contravention of 42 U.S.C. §1983 and the Eighth Amendment to the United States Constitution, as that Amendment is made applicable to the states by the Fourteenth Amendment thereto, as enumerated in plaintiff's Third Cause of Action;

(l) a more stringent standard of review for release and/or for greater privileges than generally applicable to all other inmates in segregated confinement status, and the denial of any type of meaningful review of plaintiff's segregated confinement status for release and/or for greater privileges in contravention of 42 U.S.C. §1983 and the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution as enumerated in plaintiff's Fourth Cause of Action.

2. That the Court issue a preliminary and permanent injunction which prohibits and orders defendants, and each of them, in their personal and official capacities, their successors in office,

their agents and employees and all other persons in active concert and participation with them from engaging and continuing the policies, practices, acts and omissions as herein set forth, including, among such other relief as may be just, expressly enjoin defendants and each of them from:

(a) the imposition of the retrospective and more onerous additional punishment of solitary confinement of plaintiff Rust, whose capital offenses were committed prior to the enactment/promulgation of Neb. Rev. Stat. §83-4,114 (Reissue 1987), NDCS Rule 6(16), and the 26 November 1984 and the 5 December 1984 Death Row schedules;

(b) using the disciplinary procedure of solitary confinement to confine inmates, including plaintiff Rust, sentenced to the death penalty;

(c) the arbitrary, capricious and summary creation and application of "conclusive" or "irrebuttable" presumptions to make a death sentence the sole determinant for the administrative segregation/solitary confinement of all inmates under the death penalty;

(d) the classification and assignment of plaintiff Rust to the segregated confinement status of Administrative Segregation/solitary confinement without ascertaining clearly identifiable and articulable facts relating to plaintiff;

(e) the arbitrary, capricious and summary use of plaintiff Rust's sentence structure and/or death sentence as the sole determinant to classify and assign plaintiff to the segregated confinement status of Administrative Segregation/solitary confinement;

(f) deprivation of the liberty interest created pursuant to

Neb. Rev. Stat. §§83-4,109 to 83-4,123 (Reissue 1987) and Wolff v McDonnell, 418 U.S. 539, 94 S.Ct. 2963 (1974) that plaintiff Rust be placed in and/or remain in the general population of the NSP, since plaintiff's transfer to or placement in solitary confinement can be triggered only by certain events: violation of certain rules and/or the creation of a danger to the good order, safety, and security of the institution;

(g) using the less stringent standards for classification and assignment to Administrative Segregation/solitary confinement than is generally applicable to all other non-capital inmates who are classified and assigned to Administrative Segregation/solitary confinement;

(h) using the less stringent standard for classification and assignment of plaintiff, due to his sentence structure and/or death sentence, than is generally applicable to all other non-capital inmates who are convicted and sentenced under the Nebraska Criminal Code;

(i) using the more stringent standard of review for release and/or for greater privileges for plaintiff than the standard of review generally applicable to all other inmates in segregated confinement status;

(j) refusing to hold and/or conduct any type of meaningful review of plaintiff's segregated confinement status for release and/or for greater privileges;

(k) the administrative segregation and/or solitary confinement of plaintiff Rust based upon "conclusive" or "irrebuttable" presumptions, sentence structure, or death sentence is punishment

without penological justification;

(1) refusing to provide plaintiff Rust with the full panoply of due process procedures when he is classified and assigned to the segregated confinement status of Administrative Segregation and/or solitary confinement pursuant to Neb. Rev. Stat. §§83-4,109 to 83-4,123 (Reissue 1987), Wolff v McDonnell, 418 U.S. 539, 571 n. 19 (1974), OM 201.002.101, and the Custody Classification Manual;

(m) depriving plaintiff Rust of the liberty interest that he will be classified and assigned just as any other non-capital inmate is to be classified and assigned.

3. As alternative relief, to mandate and compel and enjoin defendants, and each of them, in their personal and official capacities, their successors in office, agents and employees, and all other persons in active concert and participation with them from engaging and continuing the policies, practices, acts and omissions as herein set forth, including, among such other relief as may be just, expressly enjoin defendants and each of them from:

(a) denying plaintiff Rust, and all other inmates under the death penalty, with full access and use of both the Death Row yard and Dayroom for time periods that closely approximate those of the general population of the NSP;

(b) failing to provide Housing Unit #4 Staff and Correctional Officers/Corporals with the necessary specialized training to properly insure effective and meaningful administration of the inmates under the death penalty and the Death Row Unit itself.

4. Require each of the defendants to pay nominal and compensatory damages in the amount of \$10,000.00 to the plaintiff.

5. Require each of the defendants to pay punitive damages in the amount of \$25,000.00 to the plaintiff.

6. That the Court grant plaintiff leave to proceed in forma pauperis pursuant to 28 U.S.C. §1915 (d) upon plaintiff's Declaration In Support of Request to Proceed In Forma Pauperis, attached hereto and incorporated herein by this reference.

7. Appoint an attorney for the plaintiff.

8. Award to plaintiff costs and expenses incurred in this action and reasonable attorney's fees as against defendants in either their official capacity, their personal capacity, or both.

9. That the Court retain jurisdiction in this Action and over the defendants and their successors in office, in their personal and official capacities, until this Court is satisfied that the unlawful policies, practices, acts and omissions, as alleged herein, no longer exist and will not reoccur.

10. For such other and further relief as this Court finds just and equitable in these circumstances.

Respectfully submitted,

John E. Rust
John E. Rust

P.O. Box 2500
Lincoln, Nebraska 68502-0500

VERIFICATION

I, John E. Rust, being first duly sworn according to law, deposes and says that this plaintiff resides at the Nebraska State Penitentiary, P.O. Box 2500, Lincoln, Nebraska 68502-0500; that I

am the plaintiff in the foregoing complaint and know the content thereof and that same is true and correct to the best of my knowledge, except as to the matters therein alleged on information and belief, and as to those matters I believe to be true.

John E. Rust
John E. Rust

SUBSCRIBED AND SWORN to before me on this 23rd day of November 1988.

Terence B. Campbell
NOTARY PUBLIC

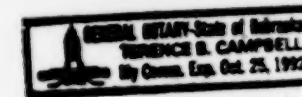


Exhibit 1 *Legal Aid Office*

Number: 201.002.101	Page Number: 1 of 2	OPERATIONAL MEMORANDUM Department of Correctional Services (Institution) <u>Nebraska State Penitentiary</u>
Subject: Reception of Capital Inmates		
Date: June 22, 1987		

DCS-A-151 (8-79)

- I. Purpose. To promulgate procedures for receiving and housing capital inmates.
- II. Policy. Under existing statutes and Agency guidelines, all male capital inmates will be housed at the Nebraska State Penitentiary during the period of their confinement as capital inmates. Special admission procedures described herein are applicable to this category of inmate.
- III. Applicability. This Memorandum is applicable to all divisions/departments/offices and will be kept current by the Office of the Deputy Warden.
- IV. General.
 - A. Individual(s) who have been given the death sentence will be delivered to the Lincoln Correctional Center's Evaluation Unit for initial processing. This processing activity will consist of taking fingerprints and identification photographs, assigning registration numbers, and including the inmate's name on a Transfer Order to the Penitentiary.
 - B. LCC Evaluation Unit staff will contact the Deputy Warden to request a maximum security escort to pick up the capital inmate(s) and transport him to the Penitentiary where he will be taken directly to Housing Unit #4. The inmate's personal property will be hand-delivered separately to the Property Control area for in-processing.
 - C. The Unit Administrator, Security Administrator, (or designees) will sign the Transfer Order which acknowledges that the named inmate has been received.
- V. Procedures.
 - A. Capital inmates automatically will be placed on Administrative Detention status and housed on "D" Wing in Housing Unit #4. If the inmate has a serious medical problem (e.g., contagious disease, etc.) the Warden will order that he be housed in the Penitentiary Hospital or in some other suitable location.
 - B. Upon arrival the inmate shall be given a written explanation of the reasons for his assignment to Death Row - a copy of which also will be placed in his record file.
 - C. Even though capital inmates will be bypassing the normal routine LCC phase of the reception and orientation process, LCC retains responsibility for developing a Classification Study for each capital inmate committed to the Department. This Classification Study will be completed in accordance with LCC guidelines.
 - D. The Team Classification Committee for Housing Unit #4 will review the status of each inmate housed on Death Row in accordance with the established institutional review schedule.

Number: 201.002.101	Page Number: 2 of 2	OPERATIONAL MEMORANDUM Department of Correctional Services (Institution) <u>Nebraska State Penitentiary</u>
Subject: Reception of Capital Inmates		
Date: June 22, 1987		

DCS-A-151 (8-79)

VI. References. AR 201.2; ACA Standard 2-4389.

Harold W. Clarke
 Harold W. Clarke
 Warden

Revision History.

Effective: December 1, 1983
 Revised: June 22, 1987

Summary of Revision

To restate the contents of sections IV and V. Also, to reassign maintenance responsibility to the Deputy Warden.

NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES
Segregation Status Review Sheet Exhibit 2

Inmate name: W. J. Rust # 0012 Location: 4L12
Unit Supervisor II: 117

Segregation Type: Disciplinary: ☐
Administrative: ☒

Reason for Segregation:

Death Row

Authority for Segregation: Warden

Hearing Summary:

Mr. Rust requested that he be considered for placement in general population or that privileges be increased on D/R. A grievance was filed on this matter and is now on appeal to the Director.

DATES OF
Present Review: 7/14/88
Last Review: 6/14/88
Inst TRD: N/A
Adm to Seg: 10/30/75
Prop Seg TRD: 1
If none - reason: Sentence Structure

Recommendations:

None

Inmate in Attendance: Yes ☒ If no, state reason: _____
No ☐

SEGREGATION STATUS REVIEW COMMITTEE

<u>[Signature]</u> Chairman	AGREE DISAGREE	_____ MEMBER	AGREE DISAGREE
<u>[Signature]</u> MEMBER	AGREE DISAGREE	_____ MEMBER	AGREE DISAGREE

INSTITUTION CLASSIFICATION COMMITTEE

DATE: 7/14/88

[Signature]

[Signature]
CHIEF EXEC. OFFICER

7-15-88
DATE

APPROVE/DENY

Comments:

DISTRIBUTION: WHITE - RECORDS CANARY - UNIT SUPERVISOR PINK - INMATE
DCS-A-388 (1/88) (Replaces DCS-C-405)

GRIEVANCE FORM
Step One
CHIEF EXECUTIVE OFFICER

RECEIVED
JUL 22 1988
INSTRUCTIONS: IF MORE SPACE IS NEEDED USE ATTACHMENT SHEET IN TRIPLICATE

Exhibit 3

RUST, JOHN E.

30118

From: _____ LAST NAME FIRST MIDDLE INITIAL NO

NEBRASKA STATE PENITENTIARY

Part A - INMATE REQUEST

This grievance deals with my confinement in solitary confinement, the refusal and failure of the Housing Unit #4 Segregation Status Review Committee, the Nebraska State Penitentiary Institution Classification Committee to conduct an adequate and meaningful Segregation Status Review or Classification Hearing regarding my placement and ongoing confinement in Administrative Segregation Status due to my sentence structure. Also, the failure and refusal of each individual who are members of the Segregation-Status Housing Unit #4 Segregation Status Review Committee, Housing Unit #4 Team Classification Committee and the Nebraska State Penitentiary Institution Classification Committee to comply with and follow the Nebraska Department of Correctional Services' Classification System, Administrative Rules or Regulations, the NSP Operational Memorandums, State and Federal Laws, and the State and Federal Constitutions, in the following respects:

1. That the Nebraska Department of Correctional Services and the Nebraska State Penitentiary's policy and practice of retrospectively imposing solitary confinement upon me pursuant to Neb. Rev. Stat. §83-4,114 (Reissue 1987) and Rule 6(16) of Chapter 4 of the Nebraska Department of Correctional Services

20 June 1988
DATE

[Signature]
CHIEF EXECUTIVE OFFICER

Part B - RESPONSE AND REASONS FOR DECISION REACHED

According to Operational Memorandum 201.002.101, Reception of Capital Inmates, capital inmates automatically will be placed on Administrative Detention status and housed on "D" Wing Housing Unit #4. Also, according to O/M 201.001.101, Unit Classification, you are being reviewed in accordance with the established institutional review schedule. Your requested relief is denied.

6-28-88
DATE

[Signature]
CHIEF EXECUTIVE OFFICER

ORIGINAL: TO BE RETURNED TO INMATE AFTER COMPLETION.

Attachment Sheet to
Step One Grievance Form
Chief Executive Officer
Page Two

#1164
RECEIVED

JUL 22 1988

NEBRASKA STATE
PENITENTIARY

Administrative Rules and Regulations violates the rights, privileges and immunities guaranteed me under the Separation of Powers Doctrine of the Bill of Attainder Clause and the Ex Post Facto Clause of Article I, Section of the United States Constitution, and the Due Process Clause of the Fourteenth Amendment to the United States Constitution since each of my four (4) concurrent criminal offenses were committed on or about 21 February 1975, which was fourteen to fifteen months prior to the 10 July 1976 effective date of Neb. Rev. Stat. §83-4,114 (Reissue 1987) and the subsequent interpretation, application and enactment of Rule 6(16) of Chapter 4 of the Nebraska Department of Correctional Services Administrative Rules and Regulations.

2. The Nebraska Department of Correctional Services and the Nebraska State Penitentiary policy and practice of confining me in solitary confinement pursuant to Neb. Rev. Stat. §83-4,114 (Reissue 1987) and Rule 6(16) of Chapter 4 of the Nebraska Department of Correctional Services Administrative Rules and Regulations violates the ~~Cruel and Unusual~~ because of my sentence structure violates the Cruel and Unusual Clause of the Eighth Amendment to the United States Constitution, as made applicable to the states by the Fourteenth Amendment thereto.

3. That I was not placed under the Departments Adult Inmate Classification system until March 1986 when the Housing Unit #4 Segregation Status Review Committee informed me of my placement under the Department's Adult Inmate Classification system via the Reclassification Action Form, and through the subsequent reclassification reviews held annually in February 1987 and February 1988.

4. That I have never been given any notice of a Director's Review Committee or Director's Classification Sub-Committee hearing, that I have never been allowed to appear before any Director's Review Committee or Director's Classification Sub-Committee regarding any Director's override or Director's Classification to place me on Death Row or Administrative Confinement Status, nor have I ever been informed that any Director's Review Committee or Director's Classification Sub-Committee convened and recommended that be placed on Death Row or Administrative Confinement Status pursuant to the Director's override provision or Director's Classification provisions of the Departments Adult Inmate Classification Manual.

5. That I have never been afforded any type of due process procedures, as required by the Nebraska Department of Correctional Services or the Nebraska State Penitentiary rules and regulation or the Departments Adult Inmate Classification Manual prior to or after my assignment to Death Row or Administrative Confinement Status.

20 June 1988

John E. Runt

Attachment Sheet to
Step One Grievance Form
Chief Executive Officer
Page Three

#116
RECEIVED

JUL 22 1988

NEBRASKA STATE
PENITENTIARY

6. That the Nebraska Department of Correctional Services and the Nebraska State Penitentiary's policy and practice of placing me in a control unit, assigned to Death Row or Administrative Confinement Status, due to my status of having been convicted of specific crimes which resulted in my sentence structure violates the Cruel and Unusual Punishment Clause of the Eighth Amendment, as made applicable to the states by the Fourteenth Amendment to the United States Constitution, and violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States.

7. That the members of the Segregation Status Review Committees have refused to conduct any adequate or meaningful review of my assignment to Death Row or Administrative Confinement Status for the possible recommendation to have me removed from segregated confinement status.

8. That the Nebraska Department of Correctional Services and the Nebraska State Penitentiary policy and practice is to keep me on Death Row or Administrative Confinement Status until I have completed my sentence or received another sentence.

9. That the Nebraska Department of Correctional Services or the Nebraska State Penitentiary does not have the legal authority to increase my sentences or to alter my sentences by imposing the additional punishment of solitary confinement

Relief requested: I want to be placed in the general population of the Nebraska State Penitentiary or in the alternative grant and afford me full access to both the Death Row yard and the dayroom of D Gallery, of Housing Unit #4, at times consistent with those of the inmates assigned to the general population of the Nebraska State Penitentiary.

20 June 1988

date

signature

John E. Runt

Exhibit 4

**GRIEVANCE FORM
Step Two
CENTRAL OFFICE APPEAL**

INSTRUCTIONS:
TYPE OR USE BALL POINT
PEN IF MORE SPACE IS
NEEDED, USE ATTACHMENT
SHEET IN TRIPLICATE

From: RUST, JOHN E. 30118 NSP
LAST NAME FIRST MIDDLE INITIAL NO. INSTITUTION

***Part A-REASON FOR APPEAL:**

The chief executive officer failed to respond to or address each of the nine (9) points that I raised in my step One Grievance. That each of these specific nine (9) points raised specific violations of my constitutional rights when each individual, who are members of the Housing Unit #4 Segregation Status Review Committee, Housing Unit #4 Team Classification Committee, the Nebraska State Penitentiary Institution Classification Committee and the Nebraska State Penitentiary administration failed to or refused to comply with and follow the Nebraska State Penitentiary Department of Correctional Service's Classification System, the DCS and NSP Administrative Rules and Regulations, the NSP Operational Memorandums, State and Federal laws, and the State and Federal Constitutions. Therefore, the relief I requested should have been granted.

1 July 1988
DATE

John E. Rust
SIGNATURE

*THE COMPLETED INSTITUTIONAL GRIEVANCE FORM, INCLUDING THE CHIEF EXECUTIVE OFFICER'S RESPONSE, MUST ACCOMPANY THIS APPEAL.

Part B-RESPONSE AND REASONS FOR DECISION REACHED

You have not been placed in solitary confinement. Because you have been sentenced to death, your housing assignment is not within the general population of the Penitentiary. You are permitted to associate with other inmates who have sentences similar to yours. At this time, I do not intend to alter this Department's policy concerning housing assignments for inmates under sentence of death.

7/7/88
DATE

[Signature]
DIRECTOR

ORIGINAL: TO BE RETURNED TO INMATE AFTER COMPLETION.

MAR 23 PAGE

ORIGINAL

DISTRIBUTED

No. 89-5900

4

RECEIVED

MAR 12 1990

OFFICE OF THE CLERK
SUPREME COURT, U.S.

MAR 12 1990

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

JOHN E. RUST

Petitioner,

vs.

FRANK O. GUNTER, HAROLD W. CLARKE, GARY
GRAMMER, FRANCIS X. HOPKINS, MARIO PEART,
JOHN T. EGGERS, ROGER PEHRSON, DOUGLAS
ADAMS, ROBERT BENSON, TERRY KIENE,
RUSSELL SCHUSTER, MICHAEL R. FORD, KARL
EISBACK, NEBRASKA STATE PENITENTIARY
HOUSING UNIT #4 CORRECTIONAL OFFICERS/
CORPORALS, NEBRASKA STATE PENITENTIARY
CLASSIFICATION COMMITTEE MEMBERS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

I

EX POST FACTO CLAUSE

That prior to the enactment of §83-4,114 and NDCS Rule 6(16)
the only preexisting authority to allow solitary confinement, for
purposes of institutional control, was §83-185 (Cum. Supp. 1972)

7/14

which was addressed by the Court in Wolff v McDonnell, 418 U.S. 539 (1974). The text of §83-185 is detailed in Wolff, at 545 n. 5. The Court in Wolff, at 571 n. 19, specifically found that solitary confinement is normally imposed only when it is claimed and proved that there has been a major act of misconduct. Petitioner cited Wolff, supra, which addressed §83-185, in paragraphs 44 and 45 of his Complaint which respondents have placed in the Appendix of their Brief. Thus, the solitary confinement aspect of Wolff is incorporated in §§83-4,111 and 83-4,114. However, §§83-4,114 allowance of solitary confinement, for purposes of institutional control, was not applied to the administrative segregation of inmates until the respondents reinterpretation of §83-4,114 pursuant to the repeal of NDCS Rule 6(14) and enactment of NDCS Rule 6(16) in September 1985, or to Death Row inmates until the promulgation of the 26 November 1984 and 5 December 1984 Death Row schedules along with the subsequent repeal of NDCS Rule 6(14) and enactment of NDCS 6(16) in September 1985. Thus, NDCS Rule 6(14) close confinement provisions prevented the solitary confinement of inmates for purposes of institutional control.

Respondents' argument ignores the facts in this case. That Neb. Rev. Stat. §29-2204 (Reissue 1985) was the only statute to allow the imposition of solitary confinement upon the petitioner, on the date his criminal offenses were committed. It is obvious that the enactment of §83-4,114 on approximately 10 July 1976, the reinterpretation of §83-4,114 which resulted in the promulgation of the 26 November 1984 and 5 December 1984 Death Row schedules and the enactment of NDCS Rule 6(16) in September 1985 confers upon the

respondents a power that had been confided to the trial court pursuant to §29-2204, and is a departure from the law as it stood when petitioner's criminal offenses were committed. See In re Medley, 134 U.S. 160, 172 (1891).

A careful reading of the text of NDCS Rule 6(16) demonstrates that solitary confinement is a disciplinary or punitive measure when used for purposes of institutional control. The second sentence of NDCS Rule 6(16) mandates that no offender shall be placed in solitary confinement for disciplinary reasons. However, the third or final sentence of NDCS Rule 6(16) specifically mandates that this provision does not apply to segregation or isolation of persons for purposes of institutional control. Therefore, the final sentence of NDCS Rule 6(16) negates the provision of the second sentence that mandates that no offender shall be placed in solitary confinement for disciplinary reasons. Thus, the final sentence of NDCS Rule 6(16) specifically allows solitary confinement as a disciplinary or punitive measure instead of, as the respondents allege, being "reasonably related" to maintaining the safety and health of inmates and employees for purposes of institutional control.

Respondents state, in their Brief at 5, that, "Inmate assignments to residence units in administrative segregation are based on status, not conduct, within the institution." Thus, pursuant to NDCS Rule 6(16) the petitioner has been assigned to the additional disciplinary or punitive measure of solitary confinement based on petitioner's "status" of being convicted of a criminal offense that carried a sentence of death. Respondents cannot evade

the bar upon ex post facto laws by giving administrative form to the imposition of solitary confinement upon petitioner who is convicted of a criminal offense which resulted in the death penalty when the district court failed or refused to impose solitary confinement upon petitioner. See Cummings v Missouri, 71 U.S. (4 Wall.) 277, 325 (1867); see also Neb. Rev. Stat. §83-4,111(3) (Reissue 1987) which mandates that rules and regulations adopted pursuant to 83-4,109 to 83-4,123 shall in no manner deprive an inmate of any rights and privileges to which such person is entitled under other provisions of law or under policies adopted in a correctional institution

That imposition of solitary confinement pursuant to §29-2204 or §83-4,114 and NDCS Rule 6(16) constitutes an additional punishment when its imposition is based upon petitioner's status of being convicted of a criminal offense which resulted in the death penalty.

An analysis, under DeVeau v Braisted, 363 U.S. 144, 160 (1960) and Turner v Safely, ___ U.S. ___, 107 S.Ct. 2254, 2261-62 (1987), as to the reasonableness of petitioner's solitary confinement, will reveal an exaggerated response to the situation and an intent to punish without penological justification, which constitutes a violation of the Ex Post Facto Clause.

II

EIGHTH AMENDMENT

Petitioner alleged in his Complaint that he is confined in solitary confinement pursuant to §83-4,114 and NDCS Rule 6(16). The district court accepted petitioner's allegations as true at the pleading stage and apparently rejected the acting Director's

response in the prison grievance attached to petitioner's Complaint. See Cruz v Beto, 405 U.S. 319, 322 (1972). Furthermore, respondents admit, in their Ex Post Facto argument, that §83-4,114 and NDCS Rule 6(16) expressly authorizes the segregation or isolation of any inmate "for purposes of institutional control" and that "Inmate assignments to residence units in administrative segregation are based on status, not conduct, within the institution. Thus, the district court and Eighth Circuit correctly determined that the placement of petitioner in solitary confinement on death row . . .". Thus, respondents' intimation that petitioner is not confined in solitary confinement when they state "Although petitioner freely and mistakenly uses the term 'solitary confinement' to describe his confinement, . . ." or quote from the acting Director's response to a prison grievance attached to petitioner's complaint, is without merit.

As argued in this Reply Memorandum, at 3, a careful reading of the text of NDCS Rule 6(16) demonstrates that solitary confinement is a disciplinary or punitive measure when used for purposes of institutional control and as the respondents have admitted in their Ex post Facto argument "Inmate assignments to residence units in administrative segregation are based on status, not conduct, within the institution" the placement of petitioner in solitary confinement based upon his status of having been convicted of a criminal offense which resulted in the imposition of the death penalty constitutes cruel and unusual punishment without penological justification. See Turner v Safely, 107 S.Ct. at 2261062; Robinson v California, 370 U.S. 660 (1962); Trop v Dulles, 356 U.S. 86, 99 (1958)

CONCLUSION

The Eighth Circuit Court of Appeals erred when it affirmed the district court's finding that the ex post facto clause was not implicated, whether the imposition of solitary confinement is totally without penological justification and involves unnecessary infliction of pain and is grossly disproportionate to the end to be achieved or the crime warranting imprisonment, and the failure to address whether some of meaningful periodic review of the conditions of death row confinement is required to insure that conditions do not violate the Constitution.

Respectfully submitted,

John E. Rust
John E. Rust #30118
Pro Se

P.O. Box 2500
Lincoln, Nebraska 68502-0500

CERTIFICATE OF SERVICE

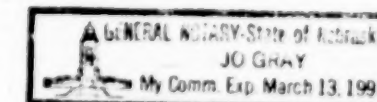
STATE OF NEBRASKA)
COUNTY OF LANCASTER) SS.

I, John E. Rust, being first duly sworn, depose and state that a copy of the foregoing Petitioner's Reply Memorandum to the Opposition Brief of Amicus Curiae on Behalf of Respondents was sent to the Respondents' attorney: William L. Howland, Nebraska Department of Justice, 2115 State Capitol, Lincoln, Nebraska 68509, by United States Mail, postage prepaid, this 5th day of March 1990.

John E. Rust
Affiant

SUBSCRIBED AND SWORN to before me on this 5 day of March, 1990.

JO GRAY
NOTARY PUBLIC



(6)

SUPREME COURT OF THE UNITED STATES

JOHN E. RUST *v.* FRANK O. GUNTER ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

No. 89-5900. Decided June 11, 1990

The motion of Alvin J. Bronstein, Esquire, to withdraw as counsel for the petitioner is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Eighth Circuit for further consideration in light of the representations made by counsel for petitioner appointed by the Court in his motion to withdraw as counsel filed May 22, 1990, the response to that motion filed by respondent May 30, 1990, and petitioner's motion for appointment of counsel filed June 4, 1990. The motion of petitioner for appointment of new counsel is denied as moot.

JUSTICE STEVENS, concurring.

While I join the Court's disposition, I believe it is appropriate also to call the Court of Appeals' attention to our decision in *Neitzke v. Williams*, 490 U. S. — (1989)—a case that it apparently overlooked when it entered its earlier judgment.

1128